Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANDREW J. MULLER, A MINOR CHILD, BY HIS PARENTS AND NEXT FRIENDS, RONALD G. MULLER AND ANN H. MULLER,
Petitioners,

V.

JEFFERSON LIGHTHOUSE SCHOOL, STEVEN MILEY, IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF JEFFERSON LIGHTHOUSE SCHOOL, AND RACINE UNIFIED SCHOOL DISTRICT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver
(Counsel of Record)
Frederick H. Nelson
Nicole Arfaras Kerr
Liberty Counsel
1900 Summit Tower Blvd.
Suite 560
Orlando, FL 32810
(407) 875-2100
Counsel for Petitioners

95 PP

QUESTIONS PRESENTED FOR REVIEW

1. Whether *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969), which involved students in grades two through eleven and which held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," is applicable to a fourth grade student who sought, in a nondisruptive manner, to hand out religious literature to fellow students during non-instructional times.

2. Whether this Court's holding in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), that a public school newspaper closely associated with the curriculum and teacher sponsored was a nonpublic forum for student speech, means that public school hallways are also nonpublic fora in regards to student interpersonal communication during non-instructional times.

3. Whether a District-wide Policy governing grades K-12 requiring that all non-school sponsored literature distributed by students to other students during non-instructional times be first pre-approved by school officials at least twenty-four hours in advance, and upon approval be placed in a designated location with a disclaimer affixed to the literature, is an unconstitutional prior restraint.

4. Whether a District-wide Policy governing grades K-12 requiring that all non-school sponsored literature distributed by students to other students during non-instructional times be first pre-approved by school officials at least twenty-four hours in advance to be reviewed for content and viewpoint, and upon approval be placed in a designated location with a disclaimer affixed to the literature, is an unconstitutional content and viewpoint restriction.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

None of the Petitioners or Respondents are corporations.

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IN THE

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OCTOBER TERM, 1996

ANDREW J. MULLER, A MINOR CHILD,
BY HIS PARENTS AND NEXT FRIENDS,
RONALD G. MULLER AND ANN H. MULLER,

Petitioners,

V.

JEFFERSON LIGHTHOUSE SCHOOL,
STEVEN MILEY, IN HIS OFFICIAL CAPACITY
AS PRINCIPAL OF JEFFERSON LIGHTHOUSE SCHOOL,
AND RACINE UNIFIED SCHOOL DISTRICT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Andrew J. Muller, Ronald G. Muller and Ann H. Muller, respectfully petition for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is reported as *Muller v. Jefferson Lighthouse School,* 98 F.3d 1530 (7th Cir. 1996), and is reproduced as Appendix A. The opinion of the United States District Court for the Eastern District of Wisconsin was not reported, but it is reproduced as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Seventh Circuit Court of Appeals was entered on October 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

This case involves the First Amendment to the United States Constitution, which provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .

U.S. Const. amend. I.

This case presents constitutional challenges to the Seventh Circuit Court of Appeal's Order reproduced as Appendix A.

STATEMENT OF THE CASE

Petitioner Andrew Muller attends Jefferson Lighthouse Elementary School in the Racine Unified School District in Racine, Wisconsin (hereinafter "District"). (App. A-2).

Petitioners challenged the District's Code of Student Responsibilities and Rights (1994-1995) (hereinafter "Code") and the School Board Policy Section 6144.11, provisions (1), (2), (3), (4) and (5) mirror Code Section IV(O), provisions (a), (b), (c), (d) and (e) (hereinafter "Policy). (App. A-6 n.2). The Code and Policy are reproduced in Appendix C. To distribute any literature during non-instructional time students must obtain prior approval and upon approval may only place the literature in a designated kiosk. (App. A-6 n.2). If approved, the literature must be placed at a specific location with a disclaimer affixed to each leaflet. (App. A-6 n.2).

On January 19, 1995, Andrew, then in fourth grade, asked his teachers for permission to hand out religious literature to his classmates at Jefferson Lighthouse School during non-instructional time. (App. A-2). The literature was an invitation to his church. Andrew was sent to Principal Steven Miley's office to obtain permission. (App. A-3). Miley told Andrew that he would not be able to distribute the literature because it was religious. (App. A-3). Respondents argue that "**the invitations of the [Petitioner] may be offensive to children of other religions**. The Principal may reasonably decide not to allow the distribution of such publication in the school in order to avoid such controversy." Respondents' Brief in Opposition to Petitioners' Motion for Declaratory and Injunctive Relief, pp. 30-31 (R.1.16.30-31) (emphasis supplied) (hereinafter "RBO").

Andrew's mother, Ann Muller, then contacted Miley. (App. A-3). Ms. Muller questioned Principal Miley as to why parents are permitted to receive information from the YMCA and Boy Scouts. (App. A-4). Miley responded that those distributions were approved by the Central Office. (App. A-4). Miley reasoned that if he allowed Andrew to distribute the

invitations, then ten other churches would want to distribute literature. (App. A-5). Miley then referred Ms. Muller to Dr. Frank Osimitz, the Director of School Operations for the District which has authority over Jefferson Lighthouse School. (App. A-5). For several weeks Ms. Muller was referred back and forth from Osimitz to Miley, but neither one granted permission. (App. A-5-6). On February 20, 1995, Ms. Muller filed a complaint against the School District Code concerning Non-School Sponsored Publications. (App. A-5-6). Petitioners' complaint was never acted upon. (App. A-6).

On April 25, 1995, Petitioners filed their Complaint. (App. A-6-7). On September 14, 1995, the United States District Court for the Eastern District of Wisconsin granted Petitioners' request for Preliminary and Permanent Injunctive relief enjoining Respondents from prohibiting distribution solely because it is religious. (App. B-12-13). The district also found the disclaimer provision, 6144.11(4), of the Code unconstitutional. (App. B-13). Characterizing the school as a nonpublic forum, the district court applied a reasonableness standard and upheld the remaining challenged Code provisions. (App. B-12-13).

Petitioners filed a Notice of Appeal on October 4, 1995, appealing the district court's Order that Code Section 6144.11, provisions (1), (2), (3) and (5), and Section 6144.12, were constitutional. (App. A-8). Respondents filed a cross-appeal claiming the district court erred in ruling the disclaimer section was unconstitutional. (App. A-8).

On October 30, 1996, the Seventh Circuit Court of Appeals affirmed in part and reversed in part. (App. A-2). Judge Manion held that: (1) public elementary schools are nonpublic fora; (2) prior approval is reasonable; (3) screening materials for offensive content is permissible; (4) the time and

place restriction is valid; (5) the Establishment Clause is not implicated; and (6) the disclaimer was valid. (App. A-31-32).

Judge Eschbach concurred in part. He agreed with Judge Manion except for Part II. (App. A-32). Judge Eschbach held that the Code provisions were reasonable and could be upheld solely on that ground, reasoning that "it is unnecessary, therefore, for this court to speculate that the free speech rights elaborated in the *Tinker [v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969)], line of cases do not extend to elementary school children." (App. A-32).

Judge Rovner concurred in part and in the judgment. (App. A-32). Judge Rovner disagreed "with the suggestion that the standard articulated in *Tinker* is unlikely to apply to grammar school students" noting that "one of the plaintiffs in *Tinker* was a 13-year-old junior high school student." (App. A-34 n.1) Judge Rovner also disagreed "with the majority that a time limit on the prescreening of printed materials is merely an administrative matter without constitutional implications." (App. A-36). Judge Rovner wrote "that a reasonable time limit on the prior review of such materials remains an important factor in determining whether a prior restraint is constitutional, and that a regulation containing no limitation whatsoever on the review period would not pass constitutional muster." (App. A-36).

REASONS FOR GRANTING THE WRIT

The Seventh Circuit held that students in public elementary schools have virtually no right to free speech during non-instructional time. However, *Tinker v. Des Moines Indepependent School Dist.*, 393 U.S. 503 (1969), extended the First Amendment to students in grades two

through eleven. Other federal courts conflict on whether the First Amendment protects students in elementary grades.

The Seventh Circuit held that all public schools are nonpublic fora in regards to student speech during non-instructional time. However, this Court held that public schools are intrinsically dedicated to student interpersonal communication during non-instructional time. The federal courts are divided on this issue.

The Seventh Circuit held that prior review of literature is permissible. This Court, however, held that any prior restraint bears a "heavy presumption" against its constitutional validity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The federal courts are especially divided on this issue, although the majority have struck down such policies.

The Seventh Circuit held that student literature may be screened for offensive messages on the basis of content and viewpoint. This Court held the "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991). Other federal courts conflict on whether both content and viewpoint may be banned. Some federal courts hold that viewpoint regulation is never allowed -- even in nonpublic fora -- while others hold that viewpoint may be banned only under the "forecast" rule created in *Tinker*.

A writ of certiorari should be issued to resolve these conflicts.

I.

THE SEVENTH CIRCUIT'S OPINION THAT THE FIRST AMENDMENT IS INAPPLICABLE TO A FOURTH GRADE STUDENT WHO SOUGHT TO HAND OUT LITERATURE DURING NON-INSTRUCTIONAL TIMES CONFLICTS WITH THIS COURT AND OTHER FEDERAL COURTS.

A. The Order Conflicts With This Court.

Judge Manion stated that the "first general question to explore is what speech rights elementary school children possess." (App. A-8). He noted "age is a critical factor in student speech cases" and "grammar schools are more about learning . . . than about robust debate." (App. A-15-16). Judge Manion rejected *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), and its progeny. (App. A-15). Judge Eschbach disagreed. (App. A-32). Similarly Judge Rovner stated: "I disagree with the suggestion that the standard articulated in *Tinker* is unlikely to apply to grammar school students." (App. A-34).

Judge Manion concluded that *Tinker* and its progeny "dealt principally with older students for whom adulthood and full citizenship were fast approaching." (App. A-15). *Tinker* noted that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. "Despite the fact a few students made hostile remarks to the children wearing armbands", *Id.* at 508, this Court permitted the speech.

In rejecting the *Tinker* line of cases, Judge Manion held:

> a public elementary school can shield its five through thirteen-year-olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development. The "marketplace of ideas," an important theme in the high school student expression cases, is a less appropriate description of an elementary school . . . .

(App. A-16).

Petitioner Andrew was in fourth grade. (App. A-2). In *Tinker*, the students were an eight-year-old second grader, an eleven-year-old fifth grader, a thirteen-year-old eighth grader and a fifteen-year-old eleventh grader. *Tinker*, 393 U.S. at 516 (Black J., dissenting).

Judge Manion concluded that "the Supreme Court has not directly decided this question." (App. A-16-17). However, this Court did not limit *Tinker* to junior and senior high. The Code applies to all students in K-12. Yet, the panel upheld the Code in spite of its application to junior and senior high schools.

Judge Manion discussed two conflicting educational concepts. First, the "traditional" view holds that children are in the temporary custody of the state as "schoolmaster." Citing *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. 2386, 2391 (1995), Judge Manion noted that public schools are seen as an "institution of nurturing authority created to inculcate learning and social and political habits and mores . . . ." (App. A-9) (citing *Bd. of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion)).

Second, Judge Manion reviewed this Court's competing concept that "school children are autonomous individuals, treated as adults, entitled to free speech rights during school hours. The emphasis is on schools as expressive forums." (App. A-9). Free speech and the "marketplace of ideas" it fosters are said to promote a wide and not entirely structured exposure to new ideas and robust debate. (App. A-9-10) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). Under this Court's second approach, the concern is that school authority not "strangle the free mind at its source." (App. A-10) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Judge Manion discussed the historical significance of the second view and its current flux within this Court's jurisprudence, noting:

> At common law, school teachers and administrators stood *in loco parentis* over the children entrusted to them. . . . However, its force in public schools . . . has been somewhat weakened by a line of Supreme Court opinions recognizing certain student rights, especially First Amendment rights.

(App. A-10) (citations omitted).

This Court first recognized the free speech interests of public school students during instructional time in *Barnette* when it held that a compulsory flag salute was unconstitutional. This Court first protected student expression during non-instructional time in *Tinker*.

Tinker formulated a new test intended to affirm student expression while recognizing the unique nature of the school environment: "[A student] may express his opinions . . . if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of

the school and without colliding with the rights of others." *Id.* at 513 (citation omitted). This Court recognized a divergence from the "traditional" view which had held the school's teaching authority is most important and the student is not yet "possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Id.* at 515 (Stewart, J., concurring). This Court held that:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. . . . [Students] are possessed of fundamental rights which the State must respect . . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Id. at 511.

In *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court allowed a school to punish a student speaker for a sexually oriented nominating speech at a school-sponsored assembly. The difference between *Tinker* and *Fraser* was that the former had no school sponsorship while the latter was school sponsored.

Judge Manion held the "traditional" view is supported in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). This Court noted that "[a] school need not tolerate student speech that is inconsistent with its basic educational mission." *Id.* at 266. Hazelwood involved student speech in a school-

sponsored, teacher supervised newspaper; whereas *Tinker* dealt with student speech during non-instructional time. Judge Manion failed to realize "[t]he standard for reviewing the suppression [of] . . . school-sponsored speech [is governed] by *Hazelwood*, and all other speech by *Tinker*." *Chandler v. McMinnville School Dist.*, 978 F.2d 524 (9th Cir. 1982).

Judge Manion adopted the "traditional" view and held that student speech could be proscribed during non-instructional time. (App. A-18-19). Judge Manion held that the elementary students should be protected from viewpoints which might prick their sensitivities. (App. A-16, 24). However, this Court stated in *Tinker*:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grew up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-09 (citations omitted).

Judge Manion held that this Court has not extended *Tinker* to elementary school students. However, *Tinker* extended the First Amendment to second-graders. *Tinker*, 393 U.S. at 516 (Black J., dissenting). *Barnette* recognized that elementary school students have First Amendment protection against compulsory flag salutes.

The opinion is in direct conflict with this Court's decisions and a writ of certiorari should be issued.

B. The Order Conflicts With Several Federal Courts.

Judge Manion held that the First Amendment did not extend to elementary students. In *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 737-38 (7th Cir. 1994), the Seventh Circuit suggested that elementary school students do not have the free expression rights of high school students. Yet, in *Zykan v. Warsaw Com. Sch. Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980), the Seventh Circuit held that even high school students do not have First Amendment protection, reasoning that high school students lack intellectual skills.[1]

However, in *Berger v. Rensselaer*, 982 F.2d 1160 (7th Cir. 1993), *cert. denied*, 113 S. Ct. 2344 (1993), the Seventh Circuit held that the Establishment Clause protects fifth-grade students.

The Fourth Circuit held in *Baughman v. Bd. of Educ.*, 478 F.2d 1345, 1348 (4th Cir. 1973), that junior and high school students do not fully possess First Amendment rights.

However, a federal court in Florida held that a fifth grade student's right to distribute literature was protected by the First Amendment. In *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994), the court held a school policy similar to the Code was an unconstitutional prior restraint. The facts involved a fifth-grade student who wanted to

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[1] In *Hedges v. Wauconda Community Unit School Dist. No. 118*, 9 F.3d 1295, 1298 (7th Cir. 1993), the Seventh Circuit held that "nothing in the First Amendment postpones the right of religious speech until high school." Judge Manion distinguished *Hedges*. (App. A-15).

distribute invitations to a church function. The policy required prior approval of the superintendent before students could distribute literature. *Johnston-Loehner* followed *Tinker*. Also, in the California case of *Jeglin ex rel. Jeglin v. San Jacinto Unified School Dist.*, 827 F. Supp. 1459 (C.D. Cal. 1993), the court applied First Amendment protection to elementary students, holding that a dress code violated their free speech rights.

II.

THE SEVENTH CIRCUIT'S OPINION THAT PUBLIC SCHOOL HALLWAYS ARE NONPUBLIC FORA IN REGARDS TO STUDENT INTERPERSONAL COMMUNICATION DURING NON-INSTRUCTIONAL TIMES CONFLICTS WITH THE OPINION OF THIS COURT AND OTHER FEDERAL COURTS.

A. The Order Conflicts With This Court.

There are three types of fora for First Amendment speech: traditional, designated and non-public. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In the first two fora, the government may enforce content-based restrictions only if it shows that the enforcement "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Id.* at 45-46. Restrictions in nonpublic fora must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46.

The panel held that, "key to the holding in *Hazelwood [School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)], and ultimately to our holding here . . . was an initial determination of the type of forum at issue." Judge Rovner disputed that

Hazelwood applied, stating: "My colleagues conclude that so long as a restriction is 'reasonable,' it does not violate the First Amendment. To come to this conclusion, however, the majority relies on a line of cases that pose a significantly different question from the one we are confronting here." (App. A-32). Judge Rovner suggested a stricter scrutiny. (App. A-34-35).

By following *Hazelwood* and an earlier Seventh Circuit decision, the majority held that public school hallways and playgrounds are nonpublic fora for student expression. (App. A-18-20) (citing *Hedges v. Wauconda Community Unit School Dist. No. 118*, 9 F.3d 1295, 1300 (7th Cir. 1993)). The *Hedges* court asked: "What kind of forum is a junior high school?" *Id.* at 1300. *Hedges* states that: "*Lamb's Chapel* [*v. Center Moriches Free School Dist.*, 113 S. Ct. 2141 (1993)], decided while this case was on appeal, answers that a school is a 'nonpublic forum' . . . ." *Hedges*, 9 F.3d at 1300. *Hedges* misinterpreted this Court's holding in *Lamb's Chapel*.

Lamb's Chapel held that: "We need not rule on [the forum] issue . . . ." 113 S. Ct. at 2146-47. This Court never ruled that public schools are nonpublic fora for student interpersonal speech. *Lamb's Chapel* never once discusses the rights of *students*.

"To ascertain what limits, if any, may be placed on protected speech, [this Court has] often focused on the place of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *see also Heffron v. ISKCON*, 452 U.S. 640 (1981). The relevant forum is to be determined by "the access sought by the speaker." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985). The panel erroneously identified the fora as the public school

classrooms. The court should have identified the fora based upon the access sought. The speakers are *students*. The fora are the *hallways and common areas outside the classroom*. The time is during *non-instructional time*.

This Court declared that:

> **[t]he principal use to which schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students.** This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.

Tinker, 393 U.S. at 512-13 (emphasis supplied) (footnotes omitted) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). By virtue of their very existence, public schools are dedicated to interpersonal communication among students. Respondents state that "[o]ral discussion can occur on school premises at times where general discourse is permitted, such as non-instructional periods and before and after school." Respondents' Combined Brief ("RCB"), p. 33. If Andrew can verbally express himself to another student during non-instructional times without prior notification of the principal,

then he can transfer the same message to print without losing his First Amendment freedoms. Andrew desired to invite his friends to a party. According to Respondents, if Andrew had verbally invited his friends the school would not interfere. However, because Andrew reduced his invitation to written form, it must be regulated and prior approval must be obtained.[2] Under Respondents' theory, as soon as Andrew writes down his verbal expression on paper he loses his First Amendment freedoms.

There is no difference between oral and written expression except litter. *See Organization for a Better Austin v. Keefe*, 410 U.S. 415 (1971); *Martin v. City of Struthers*, 319 U.S. 143, 145 (1943); *Jamison v. Texas*, 318 U.S. 413, 416 (1943); *Schneider v. State*, 308 U.S. 147, 162 (1939); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). Rather than prohibiting the leafletter because of potential litter, the recourse is to punish the litterbug. A ban on handbilling suppresses "a great quantity of speech that does not cause the evils that it seeks to eliminate." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989). Leafletting is a "form

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[2] In *California Teachers Ass'n v. Governing Bd. of San Diego Unified School Dist.*, 45 Cal.App.4th 1383, 53 Cal.Rptr.2d 474 (Cal. Ct. App. 1996), a California court distinguished instructional and non-instructional times. The court held that a policy forbidding political buttons during instructional times was permissible, but the policy could not ban political buttons during non-instructional times.

The appeals court followed the ruling of California's Supreme Court, *en banc*, in *Los Angeles Teacher's Union, Local 1021 v. Los Angeles City Bd. of Educ.*, 71 Cal.2d 551, 455 P.2d 827, 78 Cal.Rptr. 723 (1969) (*en banc*). The California Supreme Court held: "In order to discourage persons from engaging in [violent or disruptive] activity, the courts must take pains to assure that the channels of peaceful communication remain open and that peaceful activity is fully protected." *Id.* at 565, 836, 732.

of religious activity [that] occupies the same high estate under the First Amendment as do worship in churches and preaching from the pulpits." *Murdock v. Pennsylvania*, 319 U.S. 105, 108-09 (1934). Because literature distribution is synonymous with pure speech, students have the right to distribute religious literature during non-instructional times as long as their activities do not disrupt the orderly operation of the school. *See Tinker*, 393 U.S. at 509.

The majority's opinion conflicts with this Court's precedent regarding student's speech rights and the fora question. The panel could not agree on the analysis to be applied. This Court should issue a writ of certiorari to settle this question.

B. The Order Conflicts With Several Federal Courts.

Following *Tinker*, several federal courts have recognized a distinction between the speech rights of students verses non-students. The Ninth Circuit held that student's rights must be protected and distinguished the rights of students from other speakers, noting that "the standard for reviewing the suppression [of] . . . school-sponsored speech [is governed] by *Hazelwood*, and all other speech by *Tinker*." *Chandler v. McMinnville School Dist.*, 978 F.2d 524 (9th Cir. 1982).

Prior to *Lamb's Chapel*, the Seventh Circuit noted the difference between student speech and non-student speech. *May v. Evansville-Vanderbaugh School Corp.*, 787 F.2d 1105 (7th Cir. 1986), noted that students "retained their rights of free speech to the extent compatible with the needs of school discipline -- as do other involuntary guests of the government . . . ." *Id.* at 1112 (citing *Tinker*, 393 U.S. at 512). *See also Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 547

n.12 (3d Cir. 1984), vacated on other grounds, 475 U.S. 534 (1986); *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)

In Pennsylvania, a federal judge held that:

> In light of *Tinker*, I conclude that government intent to create public secondary schools as limited fora, during school hours, for the First Amendment personal speech of the students who attend those schools is intrinsic in the dedication of those schools. Only when the schools cease operating is that intent negated.

Slotterback v. Interboro School Dist., 766 F. Supp. 280, 292 (E.D. Pa. 1991).

In Colorado, another federal court concluded that: "Whether or not a school campus is available as a public forum to others, it is clear that the students, who of course are required to be in school, have the protection of the First Amendment while they are lawfully in attendance." *Rivera v. Bd. of Regents*, 721 F. Supp. 1189, 1197 (D. Colo. 1989). A federal court in Texas followed this distinction.

> *Tinker* provides the standard for restricting student speech on campus that is not part of a school sponsored program. "Where there is no finding and showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained."

Clark v. Dallas Independent School Dist., 806 F. Supp. 116, 119 (N.D. Tex. 1992) (quoting *Tinker*, 393 U.S. at 509).

> Public schools are dedicated, in part, to accommodate students during prescribed hours for interpersonal communication. Students cannot be limited during non-instructional times without a showing of interference with school activities or with the rights of other students. "Dedication to specific uses [including student interpersonal communications] does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property."

Slotterback, 766 F. Supp. at 293 (quoting *Tinker*, 393 U.S. at 512 n.6). *But cf. Nelson v. Moline School Dist.*, 725 F. Supp. 965, 971-74 (C.D. Ill. 1989) (hallways are non-public fora).

On the issue of distributing literature during non-instructional times, Judge Manion held that: "Prohibiting handbilling in the hallway between classes is also reasonable to avoid congestion, confusion, and tardiness, to say nothing of the inevitable clutter caused when the recipient indiscriminately discards the handout." (App. A-27) (citing *Hemry by Hemry v. School Bd. of Colorado Springs*, 760 F. Supp. 856 (D. Colo. 1991).

The Seventh Circuit's position on the forum question and literature distribution during non-instructional times conflicts with this Court and several other federal courts. This Court should resolve this conflict.

III.

THE SEVENTH CIRCUIT'S OPINION THAT A PRIOR RESTRAINT IS NOT CREATED BY A POLICY REQUIRING THAT ALL LITERATURE DISTRIBUTED BY STUDENTS DURING NON-INSTRUCTIONAL TIMES BE PRE-APPROVED AND PLACED IN A DESIGNATED LOCATION WITH A DISCLAIMER CONFLICTS WITH THIS COURT AND OTHER FEDERAL COURTS.

A. The Order Conflicts With This Court.

The panel was also divided regarding the prior restraint question. Judge Manion held the Code's prior review provision was not a prior restraint. (App. A-20-21). Judge Rovner disagreed, asserting the Code was a prior restraint.

> I thus remain unconvinced that a reasonableness standard is applicable to this case, and believe that a more searching review, akin to that applied in *Tinker*, is appropriate, particularly because the Code at issue here involves a prior restraint on student speech.

(App. A-36) (citing *Burch v. Barker*, 861 F.2d 1149, 1157-59 (9th Cir. 1988)).

Section IV(O) of the Code states that even one piece of literature any student desires to distribute "must be given to the principal at least 24 hours before its distribution." (App. A-6 n.2). The Code's prior review is a prior restraint. A prior restraint bears a "heavy presumption" against its constitutional validity. *See Bantum Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

"The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and for the State to classify them." *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2520 (1995). The requirement of giving advance notice to the government of one's intent to speak inherently inhibits free speech. *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984).

A system of prior restraint must be accompanied by adequate procedural safeguards. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1989). The denial must be of brief duration, provide quick judicial review and the state must bear the burden to initiate court action to prove its grounds for denial.

Judge Rovner stated:

> I also disagree with the majority that a time limit on the prescreening of printed materials is merely an administrative matter without constitutional implications. . . . I believe that a reasonable time limit on the prior review of such materials remains an important factor in determining whether a prior restraint is constitutional, and that a regulation containing no limitation whatsoever on the review period would not pass constitutional muster.

(App. A-36).

The Code does not provide adequate procedural safeguards, nor a definite time limit within which to grant or deny permission. "The failure to place limitations on the time within which a . . . decision maker must make a determination . . . is a species of unbridled discretion."

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969). The absence of a time limit "creates [in every application] an impermissible risk of suppression of ideas." *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 n.15 (1984). Andrew waited several months for the school to respond to his request.

B. The Order Conflicts With Several Federal Courts.

In *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988), the Ninth Circuit found unconstitutional a policy which required prior review of all student-written material before distribution. According to *Burch*, the "majority of courts of appeals considering policies similar to the one at issue here found them violative of the First Amendment because they were overly broad and inadequately focused on avoidance of disruption and interference with school discipline." *Id.* at 1157. Indeed, "a policy which subjects all non-school-sponsored communications to predistribution review for content censorship violates the First Amendment." *Id.*

In *Fujishima v. Bd. of Educ.*, 460 F.2d 1355, 1358 (7th Cir. 1972), the Seventh Circuit held that, "*Tinker* in no way suggests that students may be required to announce their intentions of engaging in a certain conduct beforehand so school authorities may decide whether to prohibit the conduct."

In *Riseman v. School Committee*, 439 F.2d 148 (1st Cir. 1971), the First Circuit invalidated a policy requiring literature to be pre-approved.

The Second Circuit has also held that a prior review is a prior restraint. In *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2nd Cir. 1971), the Second Circuit affirmed, but

modified, the lower court's opinion to allow prior review of publications if accompanied by elaborate procedural safeguards.

In *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971), the Fourth Circuit held that enforcement of a rule which required prior permission from the principal before distributing any material was unconstitutional. *Quarterman* found the lack of criteria or procedural safeguards, as the regulation's "basic vice." *Id.* at 59.

This same "basic vice" was present in *Baughman v. Bd. of Education*, 478 F.2d 1345 (4th Cir. 1973). The court held that school authorities may exercise prior restraint on publications distributed on school premises only where they can reasonably forecast substantial disruption of or material interference with school activities. *Id.* at 1348.

The Fourth Circuit has also indicated that a prior restraint occurs when a policy fails to provide a reasonable time limit on the review of materials. *See Nitzberg v. Parks*, 525 F.2d 378, 383-85 (4th Cir. 1975). The Fourth Circuit noted that an important factor in determining whether a prior restraint is constitutional is whether a regulation contains a limitation on the review period.

On the other hand, the Fifth Circuit held in *Shanley v. Northeast Independent School Dist.*, 462 F.2d 960 (5th Cir. 1972), that: "There is nothing unconstitutional per se in a requirement that students submit materials to the school administration prior to distribution." *Id.* at 969. Noting "the necessity for discipline and orderly processes in the high schools, it is not at all unreasonable to require that materials destined for distribution to students be submitted to the school administration prior to distribution." *Id.*

The Eighth Circuit has also upheld prior review of students literature. In *Bystrom v. Fridley High School*, 822 F.2d 747 (8th Cir.1987), the court held that a school could prohibit "introduction onto [its] property by students . . . written material pervaded or characterized by four-letter words that used to be considered unprintable." *Id.* at 753.

A Colorado federal court found a prior review policy unconstitutional because it gave school officials "unfettered discretion." *Rivera v. Bd. of Regents*, 721 F. Supp. 1189, 1197 (D. Colo. 1989). *Rivera* also noted that a policy similar to the one at issue here gave

> the government the power to suppress speech in advance, while imposing no time limits or other procedural obligations on school officials that would ensure that speech is suppressed to the minimum extent possible, or that the speech is supported for good and expressed reasons, rather than at the whim of school officials. *This policy gives the school authorities the power to extinguish the right of student speech through inaction and delay.*

Id. at 1198 (emphasis supplied).

In *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994), a Florida federal court held that a school policy similar to the Code was an unconstitutional prior restraint. The facts involved a fifth-grade student who wanted to distribute invitations to a church function. The policy required prior approval of the superintendent. *Id.* at 577. The Florida court stated the "scope of this policy encompasses all speech, not merely religious speech. A student wishing to distribute any form of written speech, from a party invitation to political tracts, must submit that speech to a school official

for content review and approval prior to distribution." *Id.* at 580.

In *Sullivan v. Houston Independent School Dist.*, 333 F. Supp. 1149 (S.D. Tex. 1971), a Texas federal court found that requiring even a one-day review by the principal was a prior restraint. The school could not justify the imposition of any prior restraint on the distribution of underground newspapers. *See also Slotterback v. Interboro School Dist.*, 766 F. Supp. 280 (E.D. Pa. 1991); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969).

IV.

THE SEVENTH CIRCUIT'S OPINION THAT STUDENT INTERPERSONAL COMMUNICATION DURING NON-INSTRUCTIONAL TIMES MAY BE PROSCRIBED BASED ON CONTENT AND VIEWPOINT CONFLICTS WITH THIS COURT AND OTHER FEDERAL COURTS.

A. The Order Conflicts With This Court.

Citing *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), Judge Manion held that "a public elementary school can shield its five through thirteen-year-olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development." (App. A-16). Judge Manion held that schools have "an interest in protecting minors from exposure to vulgar and offensive" speech, which includes insulting speech. (App. A-21) (quoting *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)). Principal Miley told Andrew that he could not distribute the invitations because they were religious. Respondents argued that "**the invitations of the [Petitioner] may be offensive to children of other religions**." RBO 30-31 (R.1.16 30-31).

"The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992). Indeed, "content discrimination raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 2545. *See also Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).[3]

In conflict with this Court, Judge Manion held that "a school need not tolerate student expression of viewpoints which are fundamentally 'inconsistent with its basic educational mission.'" (App. A-13). On the one hand, Judge Manion held that viewpoint regulation is permissible, but then he wrote: "What the courts have not permitted is suppression of a particular viewpoint." (App. A-24).

The panel expressed internal conflict on the viewpoint question. Judge Manion held that "it makes no sense to say that the overly zealous Christian or Jewish child in an elementary school can say [his religion is the correct religion] to his classmate, no matter the impact." (App. A-19). Judge Rovner disagreed, stating that students "cannot be punished merely for expressing their personal views on school premises . . . unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" (App. A-33). In *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969), this Court stated: "The Nation's future

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[3] Content-based restrictions raise Fourteenth Amendment equal-protection concerns. *See Burson v. Freeman*, 112 S. Ct. 1846, 1850 n.3 (1993); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1963)).

This Court has stated that a listener's "reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. The Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992); *see also Boos v. Barry*, 485 U.S. 312, 321 (1988). *See also Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2523 (1994). This Court has held that "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. *Tinker*, 393 U.S. at 513. This Court should issue a writ of certiorari to clarify this conflict and resolve the question of viewpoint discrimination.

B. The Order Conflicts With Several Federal Courts.

In *Hedges v. Wauconda Community Unit School Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993), the Seventh Circuit held that students "may hand out literature even if the recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than to squelch the speaker." *Id.* at 1299. Judge Manion held that "it makes no sense to say that the overly zealous Christian or Jewish child in an elementary school can say [his religion is the correct religion] to his classmate, no matter the impact." (App. A-19). Judge Manion also ignored a prior Seventh Circuit case which held that: "What the courts have not permitted is suppression of a particular viewpoint." *May v. Evansville-Vanderbaugh School Corp.*, 787 F.2d 1105, 1113 (7th Cir. 1986).

In yet another Seventh Circuit case, *Berger v. Rensselaer Central School Corp.*, 982 F.2d 1160, 1166 (7th Cir. 1993), the court held that: "School officials cannot retain discretion over content on the one hand and on the other pretend to be constrained by the dictates of content neutrality." In another Seventh Circuit case, *Grossbaum v. Indianapolis-Marion Bldg. Auth.*, 63 F.3d 581 (7th Cir. 1995), the court held that "a desire to avoid controversy might 'conceal a bias against a viewpoint advanced by the excluded speakers.'" *Id.* at 584 (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985)).

The Second Circuit held in *Trachtman v. Anker*, 563 F.2d 512, 520 (2d Cir. 1977), that schools are permitted to shield students from offensive speech, reasoning that "a blow to the psyche may do more permanent damage than a blow to the chin.") (Gurfein, J., concurring).

Several federal district courts have enjoined enforcement of content and viewpoint censorship of student speech. In *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994), a Florida court stated:

> It is beyond dispute that the school policy imposes a prior restraint on speech. *It is also beyond dispute that the restraint is based on content, for only after reviewing content does the school decide whether particular materials may be distributed.*

Id. at 579 (emphasis supplied).

Section IV(O)(e) of the Code states in relevant part: "If the principal finds the publication . . . (3) is insulting to any group or individual . . . the principal shall notify the sponsors of the publication that its distribution may not be started, or

must stop." (App. A-6 n.2). Like the policy in *Johnston-Loehner*, the Code is unconstitutional because the prior review creates a demand for content and viewpoint censorship.

Johnston-Loehner followed in *Tinker*. "Mere fear of possible interference is not sufficient to sustain a content-based prior restraint on student speech." *Id.* at 580. *See also Runyan v. Fasi*, 762 F. Supp. 280 (D. Haw. 1991).

A Texas federal court also struck down a school policy censoring student speech based upon content. In *Clark v. Dallas Indep. School Dist.*, 806 F. Supp. 116 (N.D. Tex. 1992), the court ruled that the school district "failed to establish that [the] distribution of religious tracts gave rise to a material and substantial disruption of the operation of [the school] . . . A blanket prohibition on . . . students' expression of religious views and even proselytizing on campus is unconstitutional." *Id.* at 120.

The Code fosters viewpoint and content-based censorship of speech. Religious speech was banned because Respondents did not want to allow students to discuss *some* religious viewpoints. This opinion conflicts with the decisions of this Court and other federal courts.

CONCLUSION

In light of the reasons stated above, Petitioners respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully Submitted,

Mathew D. Staver
(Counsel of Record)
Frederick H. Nelson
Nicole Arfaras Kerr
Liberty Counsel
1900 Summit Tower Blvd.
Suite 560
Orlando, FL 32810
(407) 875-2100
Counsel for Petitioners

January 28, 1997

IN THE
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

Nos. 95-3384 & 95-3482

ANDREW J. MULLER, a minor child, by his parents and next friends, RONALD G. MULLER and ANN H. MULLER,

Plaintiffs-Appellants,

v.

JEFFERSON LIGHTHOUSE SCHOOL, Racine, Wisconsin, STEVE MILEY, in his official capacity as Principal of Jefferson Lighthouse School, Racine Wisconsin, and RACINE UNIFIED SCHOOL DISTRICT, Racine, Wisconsin,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 95 C 442 - Ruldolph T. Randa, Judge

ARGUED MARCH 26, 1996-DECIDED OCTOBER 30, 1996

Before ESCHBACH, MANION, and ROVNER, *Circuit Judges*.

MANION, *Circuit Judge*. Fourth-grader Andrew Muller requested from his elementary school's principal permission

to hand out at school invitations to a religious meeting to be held at the church his family attends. After some dispute as to who had responsibility, the principal ultimately said no, basing his decision on the terms of the school district's Code of Student Responsibilities and Rights. The Mullers sued in federal court for declaratory and injunctive relief, claiming the school district's Code violated the constitution, most notably Andrew's rights under the free speech and free exercise of religion clauses of the First Amendment. The district court declared the elementary school a non-public forum and upheld the facial validity of all of the challenged Code provisions except a requirement that the handout contain a statement disclaiming school endorsement. We reverse the district court only on its decision on the disclaimer and otherwise affirm.

I.

Andrew Muller attends Jefferson Lighthouse Elementary School, one of 23 elementary schools in the Racine Unified School District in Racine, Wisconsin. On January 19, 1995, Andrew, then in fourth grade, asked his teachers for permission to hand out invitations to a meeting of a group called AWANA ("Approved Workmen Are Not Ashamed"[1]) being held at his church. AWANA members meet throughout the country for small group Bible studies and Christian fellowship. The Mullers consider the extension of such invitations an "effort to evangelize for the Gospel of Jesus Christ" and "an exercise of sincerely-held beliefs." According to the Mullers, Andrew sought only to distribute the invitations during non-instructional times. But the record indicates Andrew's teacher and principal may have thought

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[1] The reference is to 2 Timothy 2:15: "Study to shew thyself approved unto God, a workman that needeth not to be ashamed, rightly dividing the word of truth."

(initially at least) that Andrew wanted permission to hand out the fliers during class.

Andrew's teachers sent him to the principal's office to obtain permission. According to the Mullers, the principal, defendant Steven Miley, told Andrew he could not distribute the invitations because they were religious. Defendants deny this. They maintain Miley told Andrew he could not distribute the AWANA fliers to his class because they were neither school-supported nor directly related to school programs. According to defendants, the next morning at 8:00 a.m Miley received a telephone call from a representative of a group in Florida called "Liberty Counsel" (now the Mullers' attorneys) inquiring about the school and the district's policies regarding distribution of religious materials. Miley referred the caller to Frank Osimitz, Director of School Operations at the district's central office, and to Frank Johnson, the district's legal counsel. Miley received a similar call from Liberty Counsel on February 3, 1995.

The Mullers claim that Ann Muller, Andrew's mother, contacted Miley to clarify whether her son could distribute the invitations. Miley referred her to Osimitz at the district office, allegedly stating "I won't let Frank [Osimitz] pass this one back on my lap." But pass Osimitz did. On January 27, 1995, Mrs. Muller called Osimitz but was told the matter lay with principal Miley. Mrs. Muller returned to Miley's office on February 6, 1995 and inquired into the school's policy regarding materials like the AWANA flier. Miley asked about the contents of the flier and was given a copy. The parties differ as to what happened next.

According to defendants, Miley told Mrs. Muller that if the material was not related to a school program, a student could not hand the information out to his class. Mrs. Muller

told Miley that her son received points in the AWANA group for bringing guests to its meetings but that pervious guests had not anticipated the Christian nature of the program. The fliers would help prevent confusion by clarifying the nature of the activity. Miley said Andrew could give fliers to several of his friends but that he could not distribute them to his entire class. Asked what would have happened if Andrew has passed out the fliers without permission, Miley allegedly responded that nothing would have occurred since he likely would not have known, but that if he had found out he would have told Andrew he should have obtained permission first and should do so in the future. Miley also informed Mrs. Muller that she could pursue the matter further with Osimitz or Frank Johnson (district counsel) at the district office. Defendants claim that on February 9 or 10, 1995, Mrs. Muller left a telephone message on Miley's answering machine requesting his policy on distributing materials and a written response to Andrew's request. In a letter dated February 10, 1995, Miley responded, stating it was his "policy that materials distributed at Jefferson Lighthouse School would relate to Jefferson Lighthouse school projects and programs," but also granting permission for Andrew to distribute information to "specific friends."

The Mullers tell a somewhat different story. They claim that at his office on February 6, 1995, Miley said he would like to allow Andrew to distribute his invitation but could not because he would be forced to allow distribution of materials from other churches, which he did not want. Mrs. Muller asked Miley why, in that case, parents were allowed to receive information from the YMCA, Boy Scouts, Skatetown, and other sources. Miley said those distributions had been approved by the district's central office and again referred Mrs. Muller to Frank Osimitz. Mrs. Muller indicated she had already spoken to Osimitz and had been told it was Miley's

call whether to allow distribution of literature at the school. Miley disagreed, saying it was actually Osimitz's decision because all distributions not concerned with school business had to receive approval from the central office. Miley said he did not want to allow distribution of the invitation but that it would ultimately be up to Osimitz. He was concerned that if he allowed Andrew to distribute his fliers, "ten other churches" would want similar privileges. According to the Mullers, the next day Mrs. Muller again went to see Osimitz at the central office. Osimitz told her it was not his problem and that he would only get involved if the distribution concerned the whole district rather than one school. Mrs. Muller learned that Miley had contacted Chuck Melcher, the school's curriculum and instruction department head, and that Melcher had in turn contacted Osimitz about the matter but he had refused to decide the issue. She also learned that Melcher had contacted Frank Johnson of the district's legal department. Osimitz then asked Mrs. Muller for a copy of the invitation to give to Johnson for review. Osimitz said Johnson would contact her within a week or two, but the Mullers claim he never did. Two days later, Mrs. Muller again visited Miley seeking permission. According to the Mullers, Miley told her it was his position that Andrew's invitation did not deal with Jefferson Lighthouse School and thus required permission from Osimitz. Miley allegedly said everything would have been fine if Andrew had just handed out the invitations and not been caught, and that Andrew could still distribute them to his friends provided he did not get caught. Mrs. Muller says she objected to the dishonorable message that would send to Andrew, a message contrary to the morals she and her husband were trying to instill in their son.

On February 20, 1995, Mrs. Muller sent a letter to principal Miley, which was also addressed to Osimitz and Johnson, restating her version of the events and formally

objecting to the provisions of the school board's policy concerning non-school-sponsored publications. The Mullers did not file an official complaint with the district appealing the principal's decision. A formal Complaint form is included with the Code of Student Responsibilities and Rights (the district policy governing, among other things, distribution of handbills) for appeals to the district from the decisions of principals. Instead, on April 25, 1995, the Mullers filed a complaint in federal district court against Jefferson Lighthouse School, Steven Miley as principal, and the Racine Unified School District seeking a declaratory judgment and preliminary and permanent injunctive relief. The complaint alleged that Sections 6144.11[2] and 6144.12[3] of the Racine

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[2] Section 6144.4 states in part:

> Non-School-Sponsored Publications
>
> Publications produced by school district students without school sponsorship, or handbills, may be distributed and/or sold within the school according to the following procedure:
>
> 1. They must include the name of the sponsoring organization and/or individual.
>
> 2. A time and place for the distribution must be set cooperatively with the principal.
>
> 3. A copy must be given to the principal at least 24 hours before its distribution.
>
> 4. The publication shall contain this phrase: "The opinions expressed are not necessarily those of the school district or its personnel."
>
> 5. If the principal finds the publications (1) contains libelous [as defined in the "Definition of Terms"] or

Unified School District Code of Student Responsibilities and Rights (1994-95) on their face and as applied by Principal Miley violated Andrew's "Free Speech, Free Exercise of Religion and Equal Protection rights. . . guaranteed under the First and Fourteenth Amendments of the United States Constitution and the Religious Freedom Restoration Act of 1993 and constitute a violation of the First Amendment's Establishment Clause."

Characterizing the school as nonpublic forum, the district court applied a reasonableness standard and upheld the facial validity of all the challenged Code provisions except the requirement that a handout contain a statement disclaiming school endorsement. The court found this to be an unreasonable "regulation of the content of pure speech." The court did not resolve the discrepancies between the parties'

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obscene language, (2) may incite (lead) persons to illegal acts, (3) is insulting to any group or individuals, or (4) he/she can reasonably forecast that its distribution to the students will greatly disrupt or materially interfere with school procedures and intrude into school affairs or the lives of others, the principal shall notify the sponsors of the publication that its distribution may not be started, or must stop. The principal shall state the reason for his/her decisions.

[3] Section 6144.12 states:

Distribution and Displaying Materials

The written permission of the school principal or the superintendent of Schools is required before students may distribute or display on designated bulletin boards, materials from sources outside the school.

versions of the facts. Instead the court held that whichever rendition was correct, Miley violated the First Amendment either by not adhering to the school district's own policy or by prohibiting Andrew's fliers solely because they were religious. The court issued an injunction precluding school officials from preventing Andrew from distributing the AWANA materials on those grounds.

Both parties appeal. The Mullers raise five issues: (1) whether the Code itself constitutes an unconstitutional prior restraint on speech; (2) whether the Code's requirement that student-sponsored literature be screened for insulting messages is an unconstitutional content-based restriction; (3) whether the Code's time and place restrictions for distributing student handouts irrespective of quantity are unreasonable for distributions during non-instructional times; (4) whether *Hedges v. Wauconda Community Unit School Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993), should be overturned or modified to the extent it held that schools are nonpublic forums for student interpersonal communication and that designating locations for literature distribution of ten or more pieces is not unconstitutional; and (5)whether the Code (or at least the rationale behind it) violates the Establishment Clause. Defendants cross-appeal claiming the court erred in ruling that the disclaimer policy contained in § 6144.11(4) is facially unconstitutional. neither party contests the court's as-applied ruling.

II.

The first general question to explore is what speech rights elementary school children possess. To put this case in perspective, a brief historical review of the Supreme Court's approach to student speech rights is helpful.

The Supreme Court's case law addressing the First Amendment rights of high school students draws from two important but at times conflicting educational concepts. The first is the traditional view which holds that children are in the temporary custody of the state as "schoolmaster." *See Vernonia School Dist. 47J v. Acton*, 115 S.Ct. 2386, 2391 (1995). The public school is seen as an institution of nurturing authority created to inculcate learning and social and political habits and mores, thereby preparing children for meaningful lives, citizenship, and the full exercise of their constitutional rights. *See Bd. of Educ., Island Trees Union Free Sch. Dist. No 26 v. Pico*, 457 U.S. 853, 864 (1982)(plurality opinion). The school's teaching authority is important in the traditional view. The student is not yet "possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees," *Tinker v. Des Moines Independent Com. School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., Concurring). Under the traditional approach, the school's authority can exceed a student's free speech rights. *CF Settle v. Dickson Cty. Sch. Bd.*, 53 F.3d 152, 156 (6th Cir. 1995). The educational emphasis is less on present expression than on equipping the child with the tools of expression. *CF. Zykan v. Warsaw Com. Sch. Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980) ("A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices.")

In the second concept, school children are autonomous individuals, treated as adults, entitled to free speech rights during school hours. The emphasis is on schools as expressive forums. Free speech and the "marketplace of ideas" it fosters are said to promote a wide and not entirely

structured exposure to new ideas and robust debate. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). "According to this view, education is a participatory process with maximum interaction and independent thought." Rosemary C. Salomone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 Ga. L. Rev. 253, 258, (1992). The concern is that school authority not "strangle the free mind at its source." *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 637 (1943).

At common law, school teachers and administrators stood *in loco parentis* over the children entrusted to them. *See Acton* 115 S.Ct. at 2391. School children had only that amount of freedom that parents and school administrators thought best. *Id.* The *in loco parentis* doctrine remains in full force in private schools. However, its force in public schools, together with the authority/apprenticeship model of education it embodies, has been somewhat weakened by a line of Supreme Court opinions recognizing certain student rights, especially First Amendment rights. *See Acton,* 115 S.Ct. at 2391-92 (noting limitations on school authority). The Supreme Court first recognized the free speech interests of public school students in *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943), when it held that a compulsory flag salute exercise was an unconstitutional coercion of belief. The Court affirmed the authority and independence of school officials, noting their "important, delicate, and highly discretionary functions." *Id.* at 637. But stressing the importance of student individualism, the court nevertheless struck down the regulation. *Id.; see also id.* at 641-42 (praising "intellectual individualism").

The Court first protected actual student expression in public schools in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). *Tinker*

involved high school and junior high school students who were punished for engaging in a nondisruptive, passive expression of a political viewpoint by wearing black arm bands to protest the Vietnam War. *See Bethel School District v. Fraser,* 478 U.S. 675, 680 (1986) (discussing *Tinker*). In *Tinker*, the court explicitly addressed the conflicting interests of school authority and student autonomy. Expressing concern about coercion of political orthodoxy and support for the "marketplace of ideas," *Tinker*, 393 U.S. at 507 & 511-12, the Court endorsed a broad concept of student rights. *Id.* at 506. The Court acknowledged the vital, at times competing, interests of school officials "to prescribe and control conduct in the schools." *Id.* at 507. Still, it emphasized a view of schools as institutions of expressive individualism, *Id.* at 512, and found the restrictions on the students' symbolic speech unconstitutional. *Id.* at 514. The Court elaborated a new test intended to affirm student expression while recognizing the unique nature of the school environment: "[A student] may express his opinions . . . if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Id.* at 513 (citation omitted). In dissent, Justice Black argued that the Court had transferred too much authority over students away from schools and to itself. *Id.* at 515 (Black, J. dissenting). Instead of the "market-place of ideas," Justice Black emphasized more traditional educational goals, such as keeping student minds on their classwork and inculcating self-discipline and the values of good citizenship. *Id.*. at 518 & 524 (Black, J., dissenting).

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court emphasized school authority, much along the lines of Justice Black's dissent, in *Tinker*. *Fraser* involved a racy (though not technically obscene) nominating speech at a voluntary high school assembly held during school hours as

part of a school-sponsored student government program. Some students liked the speech, some were "bewildered and embarrassed," *id.* at 678, but the record contained no finding that the speech caused any meaningful disruption, and no one claimed the speech invaded the rights of others—the two criteria under *Tinker* for suppression of student speech. Nevertheless, the Court upheld the decision of school authorities to punish the student speaker and issued an opinion strongly stressing an inculcative and even parental vision of public education: "'[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'" *Id.* at 681 (quoting C. Beard & M. Beard, New Basic History of United States 228 (1968)). These "habits and manners of civility" must "take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students." *Id.* at 681. The Court acknowledged a freedom interest in "advocat[ing] unpopular and controversial views," but said it, "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* Since "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings," *id.* at 682, schools are free to insist "that certain modes of expression are inappropriate and subject to sanction," for "[t]he inculcation of these values is truly the 'work of the schools.'" *Id.* at 683 (quoting *Tinker*, 393 U.S. at 508). The Court also stressed the importance of maintaining a civil and well regulated school environment so as to "teach by example the shared values of a civilized social order." *Id* at 683.

The Court in *Fraser* distinguished the "*political* viewpoint" at issue in *Tinker* from the type of speech before

it. *Id.* at 685 (emphasis added). Age was also an important factor in the court's holding in *Fraser*. The Court stressed the vulnerability of a "less mature audience" (some "only 14 years old") to offensive speech. *Id.* at 683-85. Supreme Court precedent, the Court said, confirms that parents may legitimately expect schools acting on their behalf to protect their children from such speech: "[Our cases] recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 684.

The Court repeated *Fraser's* more deferential approach to the authority of educators in *Hazlewood School District v. Kuhlmeier,* 484 U.S. 260 (1988), in which a principal removed before publication articles in a high school student newspaper addressing students' experiences with pregnancy and the impact of divorce on students at the school. Addressing the constitutionality of this action, as it had done previously, the Court again acknowledged the competing interests of educational authority and student speech rights, but emphasized that "[a] school need not tolerate student speech that is inconsistent with its basic educational mission." *Id.* at 266 (citations and internal quotation marks omitted).

Key to the holding in *Hazelwood*, and ultimately to our holding here *(see infra III.A.)*, was an initial determination of the type of forum at issue. When is a school a public forum? The Court answered that "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations." *Id.* at 267 (citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 n. 7 & 47 (1983)). A public forum is not created by default, only

by design: "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'" *Hazelwood,* 484 U.S. at 267 (quoting *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985)). Speech in nonpublic forums is subject to significantly greater regulation than speech in traditional public forums.[4] Thus, where school facilities have been "reserved for other intended purposes, 'communicative or otherwise,'" and no public forum has been created, "school officials may impose *reasonable restrictions* on the speech of students, teachers, and other members of the school community." *Hazelwood*, 484 U.S. at 267 (emphasis added); *Perry*, 460 U.S. at 46 n. 7. The Court's test now is whether the restrictions are "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. Reviewing the facts of the case, the court held that the school paper was a nonpublic forum. *Id.* at 270. It then conducted a rational basis analysis and concluded that the principal's actions were constitutional. *Id.* at 274-76.[5]

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[4] *See Cornelius,* 473 U.S. at 806 & 808 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral. . . ."; "The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation."); not be the most reasonable and not an effort to suppress expression *merely* because officials oppose the speaker's view.") (emphasis added).

[5] Some might consider *Hazelwood* a narrowing of the free speech rights *Tinker* had granted public high school students. *See id.* at 290 (Brennan, J., dissenting)(accusing the Court of "denud[ing] high school students of much of the First Amendment protection that *Tinker* itself prescribed."); *see, e.g.*, Bruce C. Hafen, *Comment: Hazelwood School District and the Role of the First Amendment Institutions,* 1988 Duke L.J. 685, 692-99 (explicating shift away from more exacting *Tinker* review to

The Supreme Court has not expressly considered whether the free expression rights first announced in *Tinker* extend to grade school children. *Tinker* and its progeny dealt principally with older students for whom adulthood and full citizenship were fast approaching. The Court has not suggested that fourth-graders have the free expression rights of high school students. *See Baxter v. Vigo County School Corp.*, 26 F.3d 728, 737-38 (7th Cir. 1994). In *Hedges v. Wauconda Community School Dist. 118*, 9 F.3d 1295, 1298 (7th Cir. 1993), we acknowledged the religious speech rights of junior high school students, noting that "nothing in the first Amendment postpones the right of religious speech until high school." But the environment of an elementary school was not at issue in that case. The parties have not directed us to, and our research does not reveal, any decisions of the Courts of Appeals applying *Tinker*-based speech rights to the elementary school setting.[6]

Age is a critical factor in student speech cases, as the Supreme Court has indicated and as we noted in *Baxter*, 26 F.3d at 737-38. If a high school can suppress speech to protect 14-year-olds from sexual innuendo at a voluntary school assembly (*Fraser*), and if it can delete entire pages

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deferential rational basis review for student expression implicating school's educational mission); Salomone, *supra*, at 266-67 (noting that in *Hazelwood* Court "took a giant step on its developmental path toward a view of schooling that is firmly grounded in community power and values inculcation" instead of student rights). We need not draw that conclusion; rather we can take *Hazelwood's* non-public forum analysis at its face value.

[6] The Mullers cite one district court case extending such rights to elementary school students. *See Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994); *see also Jeglin ex rel. Jeglin v. San Jacinto Unifed School District*, 827 F. Supp. 1459 (C.D. Cal. 1993)(dress code violates free speech rights of elementary school students).

from a school newspaper because they touch on "sensitive topics" (*Hazelwood*, 484 U.S. at 272) it follows that a public elementary school can shield its five through thirteen-year-olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development. The "marketplace of ideas," an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire the means of expression.[7] Grammar schools are more about learning, including learning to sit still and be polite, than about robust debate. And yet we have held that religious speech cannot be suppressed solely because it is religious (as opposed to religious and disruptive or hurtful, etc.), a principle that makes sense in the elementary school environment. *See Hedges,* 9.F.3d at 1297-98. *Tinker* may still stand for the similar proposition that student *political* speech cannot be suppressed solely because it is political.

This review of Supreme Court precedent reveals the current state of student speech rights. In sum, since *Tinker,* students retain First Amendment rights, but "the nature of those rights is what is appropriate for children in school" where the government as educator discharges its "custodial and tutelary responsibility for children." *Acton*, 115 S.Ct. at 2392. Especially considering the important role age plays in student speech cases, *see Baxter,* 26 F.3d at 737-38, it is unlikely that *Tinker* and its progeny apply to public elementary (or preschool) students. But because the Supreme Court has

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[7] John Stuart Mill, the principal proponent of the "marketplace of ideas" metaphor, thought it inapplicable to children: "It is, perhaps, hardly necessary to say that [the marketplace of ideas] doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children. . . ." *See* Hafen,*supra,* at n. 85 (quoting J. Mill, On Liberty 13 (C. Shields ed. 1956)).

not directly decided this question, the following analysis will assume that grade schoolers partake in certain of the speech rights set out in the *Tinker* line of cases. With this background, we turn to the Mullers' claims.

III

A. *Forum Analysis*

As noted above, *Hazelwood* stressed the importance of determining whether a public or nonpublic forum is at issue. Thus, we begin by analyzing what kind of forum this public elementary school is. *See Hazelwood,* 484 U.S. at 267. The district court concluded that Jefferson Lighthouse Elementary School is a nonpublic forum subject to reasonable restrictions on speech. Despite the Supreme Court's strong support for the discretion of educators, and despite recent case law from this circuit holding that a junior high school is a nonpublic forum, the Mullers challenge the district court's conclusion.

"[S]chool facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public'[citation omitted] or by some segment of the public, such as student organizations." *Id.* In *Hedges*, we held that a "junior high school is a nonpublic forum, which may forbid or regulate many kinds of speech," including non-school sponsored literature. 9F.3d at 1302. The same is true *a fortiori* of a public elementary school where, with even younger children, the need for structuring the educational environment is that much greater. Nothing in the record suggests Jefferson Lighthouse Elementary School has been opened to anyone for "indiscriminate use." On the contrary, the complaint before us says the school is too discriminating in that it imposes significant restrictions on certain types of

student expression.

The Mullers ask us to modify or overrule *Hedges* and declare an elementary school a public forum, or a least a limited public forum for purposes of distributing student-sponsored literature. Their argument is based mainly on this language from *Tinker*: "The principal use to which schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication." *Tinker*, 383 U.S. at 512. From these two sentences the Mullers contend that "[s]chools are by their very nature designated public forums and can be none other than a designated public forum by virtue of the fact that they are dedicated 'to accommodate students during prescribed hours.'" We cannot agree that this isolated sentence from *Tinker* was meant to carry such weight, especially in the context of an opinion simultaneously affirming "the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribed and control conduct in the schools." *Id.* at 507. Student "intercommunication" is indeed important , but it is only one of many important school "activities." Classroom instruction and discipline are obviously also important. As discussed above, Supreme Court decisions since *Tinker* indicate that the teaching of civility and the inculcation of traditional moral, social, and political norms may override student expression, or at least that it is permissible for a school board to so order its educational priorities. *Fraser,* 478 U.S. at 681 & 683; *Hazelwood*, 484 U.S. at 271-72.

Further, the potential "verbal cacophony" of a public forum, *see Cohen v. California*, 403 U.S. 15, 25 (1971), can be antithetical to the delicate "custodial and tutelary" environment of an elementary school. *See Acton,* 115 S.Ct.

at 2392. The cultivation of the "habits and manner of civility" that *Fraser* held "essential to a democratic society," 478 U.S. at 681, can require a level of parent-like guidance that has no place in a public forum. Declaring the elementary school classroom, hallway, or playground forums for unfettered student communication would require either a severe incursion into the critical educational mission of the elementary school or a substantial contraction of the First Amendment protections afforded speech in a public forum. Perhaps both. But neither alteration is necessary on the facts before us. In a public forum, the Christian can tell the Jew he is going to hell, or the Jew can tell the Christian he is not one of God's chosen, no matter how that my hurt. But it makes no sense to say that the overly zealous Christian or Jewish child in elementary school can say the same thing to his classmate, no matter the impact. Racist and other hateful views can be expressed in a public forum. But an elementary school under its custodial responsibilities may restrict such speech that could crush a child's sense of self-worth.

Even assuming *Tinker* expression rights apply to children in public elementary schools, an elementary school's nonpublic forum status remains, and we apply the most recent standard elaborated by the Supreme Court in *Hazelwood*, that of "reasonableness." The test, therefore, is whether the restrictions on student expression are "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. As the Supreme Court has stressed, such "pedagogical concerns" include not only the structured transmission of a body of knowledge in an orderly environment, but also the inculcation of civility (including manners) and traditional moral, social and political norms. This approach is consistent with the firm principle that student rights must be construed "in light of the special characteristics of the school environment," *Tinker*, 393 U.S. at 506, and that "the nature

of those rights is what is appropriate for children in school." *Acton,* 115 S.Ct. at 2392. We therefore decline the Mullers' request to override *Hedges.*

B. *Prior Restraint*

The Mullers argue that the district's Code of Student Responsibilities and Rights constitutes a facially unconstitutional prior restraint. The Code stipulates that a student wishing to distribute private handbills must give a copy "to the principal at least 24 hours before its distribution." The Code also requires the "written permission of the school principal or the Superintendent of Schools. . . before students may distribute or display on designated bulletin boards, materials from sources outside the school." *See supra,* note 2.

Prior restraint of student speech in a nonpublic forum is constitutional if reasonable. *Hazelwood* dealt with prior restraint by a high school principal of articles to be published in a student newspaper. Deeming the newspaper a nonpublic forum, the Supreme Court engaged in a rational basis analysis and upheld the prior restraint as reasonable. 484 U.S. at 276. Likewise, in *Hedges* we found no constitutional problem with a school code prohibiting entirely the general distribution of written material "which is primarily prepared by non-students." 9 F.3d at 1301. We "freely concede[d]" that "adopting the expression of others is a form of speech," *id.* at 1302, but held that because a "junior high school is a nonpublic forum" it "may forbid or regulate many kinds of speech" as long as such regulations "are not arbitrary or whimsical." *Id.* Thus, "[w]hether a school serves pupils' interests by curtailing their dissemination of leaflets prepared by third parties is not a question of constitutional law. The Constitution is not a code of education, requiring schools to

adopt whatever practices judges believe will promote learning." *Id.* at 1301.

Prior restraint in the public school context, and especially where elementary schools are concerned, can be an important tool in preserving a proper educational environment. It may be necessary at times to prevent obscenity from reaching young students. Grade school students are generally between the ages of five and fourteen. The Supreme Court's "First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Fraser*, 478 U.S. at 684. *Ginsberg v. New York,* 390 U.S. 629 (1968), upheld a state statute banning the sale of sexually oriented material to minors, an act of prior restraint. The Court "ha[s] also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language." *Fraser*, 478 U.S. at 684 (citing *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978)). Certainly racially and religiously bigoted materials can be intercepted before they damage children and the school environment. Educators have the discretion to decide that anything promoting hate or violence will not be allowed to contaminate the (nonpublic forum) atmosphere of a public school. Where public school children are involved there is no practical way to protect students from materials that can disrupt the educational environment or even severely traumatize a child without some form of prior restraint. Of course, the leaflets Andrew sought to distribute were innocuous enough, but it could have been different. Obviously, school officials cannot know beforehand the nature of all literature students, or those acting through them, seek to distribute; and post-hoc responses to a harmful distribution cannot always undo the damage. Children in public schools are a "captive audience" that "school authorities acting *in loco*

parentis" may "protect." *Fraser,* 478 U.S. at 684. The challenged Code provisions aim to do that by permitting to principal to prescreen for "libelous or obscene language," incitement "to illegal acts," insults "to any group or individuals," or other materials that "will greatly disrupt or materially interfere with school procedures and intrude into school affairs or the lives of others." *See supra,* note 2. There is nothing facially unreasonable about such restrictions.

As a related argument, the Mullers contend the Code is unconstitutional because it does not contain adequate procedural safeguards and because it fails to provide a definite time limit within which the decision to grant or deny permission will be made. We disagree. The Supreme Court has never held that a detailed administrative code is required before student speech may be regulated. The Constitution does not dictate to school authorities a precise time limit for evaluating the propriety of a proposed student handout. Discretion is in the nature of the educational process and such matters of "daily operation" are reserved to the schools. *Pico,* 457 U.S. at 863-64 (plurality opinion); *Barnette*, 319 U.S. at 637 (schools have "highly discretionary functions"); *Hazelwood*, 484 U.S. at 278 ("public educator's task is weighty and delicate" and "demands particularized and supremely subjective choices" among educational options)(Brennan, J., dissenting). Judicial review of the educator's discretion is thus highly deferential. *See Tinker*, 393 U.S. at 507.

In a nonpublic forum, only unreasonable restrictions are forbidden. How much time is reasonable for evaluating a proposed student handout will depend on the nature of the handout—its subject matter, style, and length; its intended audience; the difficulty in evaluating its educational, emotional, and legal impact on its likely recipients, the

broader school environment, and the school itself; the need it creates for prophylactic restrictions to ensure the materials are distributed only to children of sufficient maturity; and so on. Other facts can affect the length of a reasonable prescreening period, such as the ability to contact a student's parents to confirm the requested distribution (especially if it is questionable), the quantity and diversity of proposed handouts, and unexpected school emergencies. Courts should not impose artificial time limits that might result in the distribution of obscene or otherwise harmful materials because a principal was out sick for a day or two, or that might unintentionally convince the school to ban (as it surely can) all student handouts rather than endure the administrative hassle. The Supreme Court's repeated emphasis on school board discretion counsels against judicial imposition of rigid deadlines or intricate procedures to deal with all contingencies. These are schools, not courts or administrative tribunals. The reasonableness of a delay in prescreening a proposed handout must be determined in a highly specific factual inquiry, not in the abstract. Thus, the Mullers' facial challenge cannot prevail.

C. *Content-Based Restrictions*

The Mullers also attack the Code's requirement that literature be screened for insulting messages as an unconstitutional content-based restriction. This argument has no merit. Even where adults with full First Amendment speech rights are concerned, the government can reserve a nonpublic forum for the purpose for which it was created, and in so doing can censor speech on the basis of content. Thus, contrary to the Mullers' suggestion, [t]he government can regulate content in a nonpublic forum." *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1113 (7th Cir. 1986); *Cornelius*, 473 U.S. at 806 ("a speaker may be

excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum"). What the courts have not permitted it suppression of a particular viewpoint. *May,* 787 F.2d at 1113. Yet even that restriction is not hard and fast with public schools, especially elementary schools. The student's right to express a point of view in a public school is only as extensive as "the special characteristics of the school environment" permit. *Tinker*, 393 U.S. at 506; *Acton*, 115 S. Ct. at 2392 ("the nature of [student] right is what is appropriate for children in school"); *Hazelwood*, 484 U.S. at 266 (student rights "are not automatically coextensive with the rights of adults in other settings.").

Though it may not act unreasonably, a school need not tolerate student expression of viewpoints which are fundamentally "inconsistent with its basic educational mission." *Id.* The older student who wishes to express his belief to first-graders on the playground that the life of a drug dealer is preferable to that of the civilized citizen may be reasonably restrained; there are compelling state and human interests at stake. *Pico*, 457 U.S. at 864 (plurality opinion)(preparatory mission of public school is "vitally important") (quoting *Ambach*, 441 U.S. at 76-77); *Shelton*, 364 U.S., at 485 (noting state's "vital concern" in manner that a teacher "shapes the attitude of young minds towards the society in which they live"); *cf. Zykan,* 631 F.2d at 1304 (suitable curriculum for students "a vital and compelling interest" of the community). Even *Tinker's* expansive approach to student speech permitted at least some viewpoint censorship where the expression materially disrupts class work, causes substantial disorder, or invades the rights of others. *Tinker,* 393 U.S. at 513. We may assume, therefore, that had the wearing of black arm bands (a viewpoint expression) sparked riots at the school, the outcome in *Tinker-*

though not the test-would have been different.

Schools, therefore, are free to screen student handouts for material that is insulting or lewd or otherwise inconsistent with legitimate pedagogical concerns. As we said above, schools have "an interest in protecting minors from exposure to vulgar and offensive" speech, *Fraser,* 478 U.S. at 684, which includes insulting speech. *Cf. Trachtman v. Anker*, 563 F.2d 512, 520 (2d Cir. 1977)("a blow to the psyche may do more permanent damage than a blow to the chin")(Gurfein, J. Concurring). Content regulation is permissible in the school environment; indeed, it is necessary to create a school environment. Thus, the Code's screening requirements are not per se unreasonable.

In so holding we reject the Mullers' implication that a school must spell out in intricate detail precisely what is "libelous or obscene language" or an incitement "to illegal acts" or an insult "to any group or individuals" or which materials "will greatly disrupt or materially interfere with school procedures and intrude into school affairs or the lives of others." *See supra* note 2. The Mullers condemn the vagueness of such language with Supreme Court cases addressing restrictions on adult expression outside the school setting. *See Smith v. Goguen,* 415 U.S. 566, 571 (1974; *Gooding v. Wilson*, 405 U.S. 518, 522 (1972); *Coates v. city of Cincinnati,* 402 U.S. 611, 614 (1971). However, schools are different. Their duties and responsibilities are primarily custodial and tutelary and thus discretionary in nature, not legalistic. An education in manners and morals cannot be reduced to a simple formula; nor can all that is uncivil be precisely defined. What is insulting or rude very often depends on contextual subtleties. A shockingly indecorous act at the dinner table may be par for the course in the locker room or on the playground. If the schools are to perform

their traditional function of "inculcat[ing] the habits and manners of civility," *Fraser*, 478 U.S. at 681, they must be allowed the space and discretion to deal with the nuances. The touchstone is reasonableness, and there is nothing facially unreasonable about the Code's content regulations.

D. *Time and Place Restrictions*

The Mullers claim the Code's time and place restrictions for literature distribution irrespective of quantity are unreasonable. Again, we disagree. The Code states that "[a] time and place for the distribution [of student sponsored literature] must be set cooperatively with the principal." *See supra,* note 2. This makes eminent sense. "[L]ike a pig in a parlor instead of the barnyard," distribution of even appropriate literature (a good thing) at the wrong time or place can be a nuisance. *Pico,* 457 U.S. at 920 (Rehnquist, J., dissenting)(quoting *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388 (1926)). Reasonable time, place, and manner restrictions are permissible in public and nonpublic forums. *Perry,* 460 U.S. at 45-46. Not everyone can parade down a street or stand on the public soap box at once. And not all places are appropriate for all types of expression. *See United States v. Kokinda,* 497 U.S. 720, 728 (1990) (plurality opinion)(postal sidewalk constructed solely to facilitate traffic between parking lot and post office, not expression, and may be so reserved).[8]

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[8] "Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a 'time, place, or manner restriction may not be based on either the content or subject matter of speech.'" *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 544-45 (1980)(Stevens J. concurring in judgment).

The establishment of an appropriate time, place, and manner for a student to distribute fliers, even where the quantities are small, is therefore appropriate. The Mullers disagree, arguing that "[s]tudents obviously should not be prohibited from passing a love note to another student, giving that student a birthday card, or giving another directions to his or her home." But the simple response is that it depends on the time, place, and manner of the distribution. The school may reasonably prohibit distribution of love notes or birthday cards during math class; math class is for learning math, not for passing love notes or birthday cards. Prohibiting handbilling in the hallway between classes is also reasonable to avoid congestion, confusion, and tardiness, to say nothing of the inevitable clutter caused when the recipient indiscriminately discards the handout. *See Hemry by Hemry v. School Bd. of Colorado Springs,* 760 F.Supp. 856 (D. Colo. 1991). When, where, and how children can distribute literature in a school is for educators, not judges, to decide "provided [such choices] are not arbitrary or whimsical." *Hedges*, 9F.3d at 1302; *see also id.* at 1301 (place restrictions proper given nature of school and function of principal to determine "cooperatively" an appropriate time and place for the distribution. This permits flexibility so that the unique needs to the school and the student can be accommodated. There is nothing *a priori* unreasonable about that.

E. *Establishment Clause*

Finally, the Mullers challenge the Code on Establishment Clause grounds. Their argument (a preemptive one) is that defendants cannot justify the Code by claiming it is necessary to prevent entanglement with religion. The Mullers are correct that speech cannot be suppressed or discriminated against solely because it is religious. See *Hedges*, 9 F.3d at 1297-98, and cases cited therein. Banning religious

expression, "which the Free Exercise Clause of the First Amendment singles out for protection, " *id.* at 1298, solely because it is religious is per se unreasonable. The Supreme Court has also rejected the view that, in order to avoid the perception of sponsorship, a school may suppress religious speech. *Widmar v. Vincent,* 454 U.S. 263, 271-73 (1981); *Bd. of Education v. Mergens,* U.S. 226, 247-52 (1990)(plurality opinion); *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141, 2148 (1993). On appeal, defendants do not suggest otherwise and do not attempt to justify any part of the Code by arguing it is necessary to avoid offending the Establishment Clause. The regulations in this case, which apply to religious and nonreligious distributions alike, do not implicate the Establishment Clause. *Hedges,* 9F.3d at 1299.

F. *Disclaimer*

Defendants cross-appeal the district court's holding that the Code provision directing that non-school sponsored publications contain a disclaimer is unconstitutional. The Code requires this phrase: "The opinions expressed are not necessarily those of the school district of its personnel." The district court found this unreasonable as a regulation of the content of speech. However, the court found no such concern with a similar Code provision (not at issue here) requiring each publication to contain the name of the entity sponsoring the material, holding it was reasonable to vindicate the school's interest in maintaining order and control and in identifying the sponsoring groups and individuals.

It is not clear why the district court found the provision requiring disclosure of sponsorship reasonable but the provision requiring a disclaimer unconstitutional. Both

require a minimal interference with the content of a handout. Neither requirement would noticeably alter the message. The absence of a disclaimer could conceivably convey to students the false impression that the school or some other organization was the publication's sponsor. Perhaps the difference between identifying sponsorship and disclaiming a connection to the school is that in some cases the sponsor would have to print the literature with the disclaimer separately, which might prevent it from distributing the literature at other locations because the disclaimer would not be relevant. But this would be a minor burden. Otherwise the disclaimer requirement is indistinguishable from the sponsorship requirement. It is simply emphasis; it underscores the fact that the school is not sponsoring the expression. That message is implicit in the requisite sponsorship statement. The disclaimer makes it explicit.

Perhaps the court's holding was in response to another argument. Defendants defended the disclaimer by contending that the regulation was necessary to avoid Establishment Clause problems, an argument they no longer advance. The court's analysis of the disclaimer was principally a rejection of the misconception that permitting distribution of religious literature on the same basis as nonreligious literature raises Establishment Clause concerns. *Hedges*, 9 F.3d at 1299, held it does not and defendants do not disagree on appeal. Probably because they were not emphasized, the district court did not fully consider other valid reasons for the disclaimer. As an institution of vital public concern, a school has a strong interest in clarifying to its students and the public what it does and does not endorse. That does not imply it can discriminate against religious speech (the district court's main concern), but it can surely inform others that it takes no position on the content of the expression, religious or otherwise. Nonendorsement was a central concern of both *Fraser* and

Hazelwood. In *Hazelwood* it helped justify suppression of entire articles in a school newspaper. The district court recognized the school's interest in not endorsing religious expression and indicated the school could post a sign clarifying its policy. Nevertheless, the court found the disclaimer requirement unnecessary and unreasonable.

No doubt a posted sign clarifying the school's policy would be a reasonable alternative. But school administrators are not confined to those means least restrictive of student speech when they pursue legitimate educational interests. *Hazelwood*, where far less drastic measures could have been used, makes this clear. The means need only be reasonable. Under that test the disclaimer provision passes. It is one of many reasonable ways for the school to make clear that it does not necessarily espouse what it permits. The provision also had advantages over the posted-sign alternative. Not all who read a handout will have obtained it from the designated point of distribution. Thus, a stationary sign at the official point of distribution may leave some recipients, students or not, confused about the school's position on the expression. The affixed disclaimer keeps the reminder with the flier, better ensuring that the message is received. Such an advantage is not obtained by an unreasonable restriction on speech and is therefore permissible.

The Mullers suggest the Code could require that every personal student note and birthday card be stamped with the disclaimer. This reading is unwarranted. The Code references "Non-School-Sponsored Publications" and "handbills." Taken in context and applying nontechnical definitions, as students, parents, and principals would, these terms do not imply what the Mullers suggest. It is highly unlikely that anybody—including defendants and the Mullers—thinks of valentines and birthday invitations when

contemplating the terms "non-school-sponsored publications" and "handbills." Even if, as the Mullers insist, someone *may* come to that conclusion, we decline to declare the provision constitutionally unreasonable because of the potential for nonsensical readings. Constitutional jurisprudence should not be drive by the absurd possibility, especially in the context of our public schools. [9] The disclaimer requirement is not unreasonable.

IV

In conclusion, we express our sympathy with the Mullers' frustration at the way school officials handled this whole affair. Andrew wanted to distribute a simple flier inviting friends to a church-sponsored activity. Regrettably, the principal's evasive reaction got in the way of an accommodating resolution. Nothing in the Supreme Court's Establishment Clause jurisprudence requires such a response, and indeed the Free Exercise and Free Speech Clauses forbid it. Andrew's right not to have his expression suppressed solely because it is religious was vindicated in the district court and not appealed by defendants. He is therefore free to express himself on religious matters, in both written and spoken form, subject only to restrictions reasonably related to legitimate pedagogical interests. Defendants confirm this on appeal. However, the Mullers' challenge to the entire Code

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[9] John H. Ely, Democracy and Distrust 181-83 (1980)(pointless to tailor constitutional law to absurd circumstances); *cf. Burnes v. United States*, 501 U.S. 129, 137 (1991)("when 'confronted . . . with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional result[,][o]ur task is to give some alternative meaning [to the statute]. . . that avoids that consequence'")(quoting *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527(1989)(Scalia J. Concurring in judgment)).

fails. The Code, including the provision requiring a statement disclaiming school endorsement which the district court found unconstitutional, is a facially reasonable tool for ensuring that student-sponsored publications do not interfere with the school's critical educational mission. It is therefore constitutional.

AFFIRMED IN PART, REVERSED IN PART.

ESCHBACH, *Circuit Judge*, concurring.

I concur in all respects with the court's opinion except for Part II. As the court makes clear in Part III, the Code provisions are reasonable and may be upheld on that ground. It is unnecessary, therefore, for this court to speculate that the free speech rights elaborated in the *Tinker* line of cases do not extend to elementary school children.

ROVNER, *Circuit Judge*, concurring in part and in the judgement.

The issue before us today is whether Sections 6144.11 and 6144.12 of the Racine Unified School District Code of Student Responsibilities and Rights (the Code), which governs the display or distribution of non-school-sponsored publications on school premises, is a facially invalid restriction on the free speech rights of grammar school students. My colleagues conclude that so long as a restriction is "reasonable," it does not violate the First Amendment. To come to this conclusion, however, the majority relies on a line of cases that pose a significantly different question from the one we are confronting here.

In *Hazelwood School Dist. v. Kyhlmeier*, the Supreme Court considered "the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum," 484 U.S. at 262, and began its analysis by reaffirming the basic principle governing students' First Amendment rights in the public school setting that it had proclaimed in *Tinker*:

> Students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' They cannot be punished merely for expressing their personal views on school premises. . . unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'

Hazelwood, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506, 509)(internal citations omitted). The Court then carefully distinguished the issue whether a school is required to tolerate student speech that occurs on school premises (which the Court has resolved in *Tinker*), from the issue in *Hazelwood* concerning the degree of control educators may retain over "student speech that is disseminated under [the school's] auspices." *Id.* at 270-72.

It was in this context, then, that the Court held that educators may exercise control over the content of student speech "in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Thus, the cases the majority relies on to establish the proper standard of review in the present case were directed at determining the extent of the authority educators may, consistent with the First Amendment principles, assert over officially-recognized school activities in

which their students participate, whether those activities be an integral part of the school curriculum as in *Hazelwood, id.* at 262, or involve voluntary participation in a school-sponsored assembly as in *Frazer,* 478 U.S. at 677-78, 681; *see also Board of Educ. of Westside Comm. Schools v. Mergens,* 496 U.S. 226, 240-41 (1990) (opinion of the Court). Yet the Code we are examining governs only the display or distribution of printed materials that originate with the students themselves, outside the purview of any school-sponsored activity. I thus remain unconvinced that a reasonableness standard is applicable to this case, and believe that a more searching review, akin to that applied in *Tinker,* is appropriate, particularly because the Code at issue here involved a prior restraint on student speech. *See Burch v. Barker,* 861 F.2d 1149, 1157-59 (9th Cir. 1988).

In *Tinker*, the Supreme Court held that, in order to justify prohibition of student speech or expression, school officials must show that the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" 393 U.S. 509 (internal quotations omitted. Thus, any regulation that requires the prescreening of non-school-sponsored materials must, at a minimum, be focused on avoiding substantial disruption or interference with school discipline. *See Burch,* 861 F2d at 1155. Needless to say, I disagree with the suggestion that the standard articulated in *Tinker* is unlikely to apply to grammar school students.[1] (*See ante,* Part II.) Given the difference in age and maturity between grammar school and high school students, I can certainly envision that speech that would be relatively innocuous in a high school setting may nonetheless "substantially interfere with the work of the school or . . . the

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[1] Indeed, one of the plaintiffs in *Tinker* was a 13-year-old junior high school student. 393 U.S. at 504.

dents" (*Tinker*, 393 U.S. at 509) in the
r school. Yet, this observation hardly
w *Tinker*, but only to apply it to the
light of the special characteristics of the
ent" (*id.* at 506) with which we are

Despite the disagreements I have outlined above, I nevertheless join the majority in holding that the Code does not deprive grammar school children of their First Amendment rights. I do so because I am convinced that the Code would survive closer review than the majority applies. In my view, grammar school children are highly impressionable, and school is a powerful setting where speech is likely to make a stronger psychological impact on young minds than it would in most other settings. Because it is often difficult for children to distinguish the source of a message conveyed to them in school, or to decide what weight to give to that message, I concur that a regulation requiring the prescreening of printed materials distributed to children in grammar school is consistent with the First Amendment. Indeed, I agree with the majority that in grammar school, "there is no practical way to protect students from materials that can disrupt the educational environment or even severely traumatize a child without some form of prior restraint," and that a "post-hoc response" certainly cannot be relied on to undo the damage caused by a distribution of literature that contains libelous or obscene language, promotes intolerance or hatred of groups or individuals , or otherwise greatly compromises school discipline or interferes with the rights of the other students. (*Ante* at 21.) The majority's own analysis therefore shows that educators in a grammar school have a substantial interest in protecting students from printed materials that could seriously harm young children, and that the prescreening provision of the Code is necessary to

furthering that interest. This, in turn, implies that the Code is not merely a "reasonable" restriction on speech, but one that would survive a significantly more stringent review.

I also disagree with the majority that a time limit on the prescreening of printed materials is merely an administrative matter without constitutional implications (*See ante* at 22-23.) To the contrary, I believe that a reasonable time limit on the prior review of such materials remains an important factor in determining whether a prior restraint is constitutional, and that a regulation containing no limitation whatsoever on the review period would not pass constitutional muster. *See Nitzberg v. Parks,* 525 F.2d 378, 383-85(4th Cir. 1975)(per Justice Clark, sitting by designation); *Quarterman v. Byrd*, 453 F.2d 54, 59-60 (4th Cir. 1971); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 810 (2nd Cir. 1971); *see also* FW/PBS, *Inc. v. City of Dallas,* 493 U.S. 215, 225-30 (1990)(O'Connor, J., plurality opinion). This Code, however, provides that non-school-sponsored publications are to be given to the principal at least 24 hours before their proposed distribution. I would interpret this to mean that in the usual case, approval or disapproval for distribution would take place within 24 hours or shortly thereafter. Of course, I agree that unforeseen circumstances having nothing to do with a desire on the part of any school administrator to squelch protected speech may arise, making it impractical for the administrator to adhere to this time limit. I also agree that a school administrator would not violate the First Amendment merely because she might on occasion fail to provide an answer within 24 hours of receiving a proposed handout from a student. I simply point out that the Code as written obviously contemplates a rapid response to a student's request to distribute printed materials, and as such, the Code is a facially valid restriction on the speech of grammar school students.

For these reasons, I joint the court's judgment, and also in Parts III.D., E. and F. of its opinion.

Clerk of the United States Court
of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ANDREW J. MULLER, a minor child, by his parents and next friends, RONALD G. MULLER and ANN H. MULLER,

Plaintiff,

-vs-

JEFFERSON LIGHTHOUSE SCHOOL, Racine, Wisconsin;

STEVEN MILEY, in his official capacity as Principal of Jefferson Lighthouse School, Racine, Wisconsin; and

RACINE UNIFIED SCHOOL DISTRICT, Racine, Wisconsin

Defendants.

DECISION AND ORDER

Andrew Muller, by Ronald and Ann Muller, ("Muller") moves for Declaratory Judgment, as well as Preliminary and Permanent Injunctive relief. Muller asks this Court to enjoin defendants, Jefferson Lighthouse School, Steven ("Miley"), in his official capacity as Principal of Jefferson Lighthouse School, and Racine Unified School District from enforcing certain provisions of the Racine Unified School District Code of Student Responsibilities and Rights (1994-1995)("Code") and from acting in such a manner as to violate Muller's rights

to Free Speech and Free Exercise of Religion, and prohibit any further violation of the Equal Protection and Establishment Clause. (Complaint at ¶ 1.) Muller also requests declaratory relief from this Court declaring certain policies of the Code to be unconstitutional. For the following reasons, one portion of the school district's Code is declared unconstitutional on its face, while the remainder of the Code survives constitutional scrutiny, and Muller is granted partial injunctive relief consistent with the following declaration.

FACTUAL BACKGROUND

On January 19, 1995, Andrew Muller, a fourth-grade student at the Jefferson Lighthouse School, asked Principal Steven Miley for permission to distribute to his class non-school-sponsored materials advertising a religious program. Principal Miley denied him permission to distribute the flyers in the manner Muller desired. In denying Muller permission, Miley maintains that, although he and Muller discussed the religious program, he did not tell Muller that he could not pass out the fliers because they were "religious". Instead, he advised Muller that he could not pass them out because they were not directly related to a school program. (Miley Aff. at ¶ 5.) When Muller's mother, Ann Muller, subsequently inquired about the school policy regarding the distribution of fliers, Miley states that he told her that "if the material was not related to a school program, a student could not hand the information out to his class." *Id.* at ¶ 8.

Muller provides a different version of Miley's statements related to the distribution of the fliers. Muller contends that when he asked Principal Miley for permission to distribute the fliers to his fourth grade class, Miley told him he "would not be able to distribute the invitations because they were religious," (Complaint at ¶ 19) and because if he allowed

Muller to distribute his invitation, "he would be forced to allow materials from other churches to be distributed and he did not want to permit such activity." *Id.* at ¶ 22. Plaintiff suggests that when Ann Muller asked Miley why parents are permitted to receive "information from the YMCA, Boy Scouts, YMCA campouts and sleepovers, Skatetown events and other miscellaneous informational distributions," Miley responded that those distributions were approved by the Central Office and that the decision to allow distribution was ultimately up to Dr. Frank Osimitz, the Director of School Operations for the Racine Unified School District.

ANALYSIS

Muller has challenged the constitutionality of Sections 6144.11[1] and 6144.12[2] of the Racine Unified School District

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[1] Section 6144.11 states in part:

Non-School-Sponsored Publications

Publications produced by school district students without school sponsorship, or handbills, may be distributed and/or sold within the school according to the following procedure.

1. They must include the name of the sponsoring organization and/or individual.

2. A time and place for the distribution must be set cooperatively with the principal.

3. A copy must be given to the principal at least 24 hours before its distribution.

4. The publication shall contain this phrase: "The opinions expressed are not necessarily those of the school district or its personnel."

Code of Student Responsibilities and Rights (1994-1995) on their face and as applied by Principal Miley, alleging that said provisions and application "violate the Free Speech, Free Exercise of Religion and Equal Protection rights of Plaintiff guaranteed under the first and fourteenth amendments to the United States Constitution and the Religious Freedom Restoration Act of 1993 and constitute a violation of the first amendment's Establishment Clause." (Complaint at ¶ 1.) The Court finds that on their face, all but one portion of the challenged Code provisions are constitutional. The Court further concludes that, applying either Miley's version of the facts or Muller's version, Principal Miley either improperly interpreted the Code provisions or utilized an unconstitutional standard in denying Muller's request. Because the Court's declaration of the respective parties' rights obligations under the Code and the Code's constitutional validity or lack thereof support a finding that Miller has met all the necessary requisites for injunctive relief, extensive discussion of those

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5. If the principal finds the publication (1) contains libelous or obscene language, (2) may incite (lead) persons to illegal acts, (3) is insulting to any group or individual, or (4) he/she can reasonably forecast that its distribution to the students will greatly disrupt or materially interfere with school procedures or intrude into school affairs or the lives of others, the principal shall notify the sponsors of the publication that its distribution may not be started, or must stop. The principal shall state the reason for his/her decisions.

[2] Section 6144.12 states:

Distributing and Displaying Materials

The written permission of the school principal or the Superintendent of Schools is required before students may distribute or display on designated bulletin boards, materials from sources outside the school.

requirements is unnecessary.

In scrutinizing the Code and principal Miley's actions under present constitutional standards, the Court must emphasize the fact than an elementary school is a non-public forum. *Hedges v. Wauconda Community Unit Sch. District No. 118*, 9F.3d 1295, 1300 (7th Cir. 1993)(citing *Lamb's Chapel v. Center Moriches Union Free School District*, ___ U.S.__, 124 L.Ed. 2d 352, 113 S. Ct. 2141, 2146-47 (1993)). The Constitution permits greater restraint of speech in non-public forums than in public forums, *Id.* at 1302, such that a school may adopt reasonable restrictions. *United States v. Kokinda*, 497 U.S. 720, 111 L.Ed. 2d, 110 S.Ct. 3115 (1990). In deciding what restrictions on students' free speech rights are reasonable, the purpose of the school forum, *Id.*, and the age and emotional maturity of the intended audience are legitimate considerations. *Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728 (7th Cir. 1994); *see also Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 98 L.Ed.2d 592, 108 S.Ct. 562 (1988); *Bethel School Dist. V. Fraser*, 478 U.S. 675, 92 L.Ed. 2d 549, 106, S.Ct. 3159 (1986).

I. FACIAL CHALLENGE

While Muller contends that all the provisions in §§ 6144.11 and 6144.12 are unconstitutional on their face, most of the provisions pass constitutional muster.[3]

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[3] The Court notes that, as written, neither §§ 6144.11 nor 6144.12 mention religion. Because the policies themselves do not address religion directly, on their face, they raise no Establishment Clause concerns. *Berger v. Rensselaer Central Sch. Corp.*, 982 F.2d 1160, 1163 n. 3 (7th Cir. 1993).

Muller contends that the provision of § 6144.11 requiring that non-school-sponsored materials "include the name of the sponsoring organization and/or individual" is unconstitutional. The Court disagrees. This provision applies evenhandedly to supporters of differing viewpoints, and does not prevent, in and of itself, the expression of any idea. While the requirement that every non-school-sponsored document contain the name of the entity sponsoring the material is a form of regulation of the content of speech, *see McIntyre v. Ohio Elections Commission*, ___ U.S. ___, 131 L. Ed.2d 426, 115 S.Ct. 1511, 1518 (1995), this concern is overridden by a legitimate state interest—the right and need of a principal, in maintaining order and control of the school, to identify groups and individuals that may want to use this school forum. It may further be argued that this policy prohibits anonymous speech protected by the First Amendment. *McIntyre*, supra. However, *McIntyre* does not stand for the proposition that there is a general right to anonymity.[4] *Id.* Indeed, the general right to anonymity was rejected in *Lewis Pub. Co. v. Morgan*, 229 U.S. 288, 57 L.Ed. 1190, 33 S.Ct. 867 (1913). Any burden on speech caused by the minimal disclosure requirement of this portion of the Code is clearly outweighed by the interest the defendants have in maintaining the order, integrity, control and administration of their school.

Section 6144.11 further requires that individuals wishing to distribute non-school-sponsored materials cooperate with the principal in setting a time and place for distribution. Despite Muller's challenge to this aspect of the policy, this provision

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[4] *McIntyre* dealt with a statute that "burden[ed] core political speech," thereby requiring the application of "exacting scrutiny," so that the restriction could only be upheld if it was "narrowly tailored to serve an overriding state interest." *McIntyre*, 115 S.Ct. at 1519. These considerations are not present in the case at bar.

is a reasonable restriction. Restricting the distribution of otherwise permissible material to a particular place and time is "not an inappropriate rule, given the nature of the school and the principal's lawful control over pupils' behavior within." *Hedges v. Wauconda Community Unit Sch. District No. 118*, 9 F.3d 1295, 1301 (7th Cir. 1993).[5]

Muller also challenges the Code provision requiring that a copy of the materials a student intends to distribute "be given to the principal at least 24 hours before its distribution." Without prior review of non-school-sponsored materials, any materials could be passed out, regardless of the harm they may cause to the welfare and sensibilities of the school children and regardless of the disruption they may cause to the educational atmosphere of the school. Without such a prior review provision, a principal would have no meaningful opportunity to restrict the distribution of constitutionally prohibitable materials. The 24-hour prior review requirement of § 6144.11 is reasonable and does not restrict speech based on content or viewpoint. It is constitutional. *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 98 L.Ed. 2d 592, 108 S.Ct. 562 (1988); *See also Community for Creative Non-Violence v. Kerrigan, 865* F.2d 382 (D.C. Cir. 1989); *Bystrom v. Fridley High School*, 822 F.2d 747 (8th Cir.

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[5] The Court notes that a principal could effectively use this authority to discriminate against materials based on content or viewpoint. For example, a principal might conveniently require a student attempting to distribute materials espousing a particular viewpoint the principal disagreed with to distribute the materials at a time and in a location where the least number of students could receive the materials while providing a better time and location for the distribution of materials espousing a viewpoint the principal agreed with. Although such an application of the present policy, if proven, would clearly be unconstitutional, such a fact scenario is not before this Court. On its face, the present time and place provision does not discriminate against any subject matter or viewpoint.

1987);

Muller further objects to the § 6144.11 provision requiring that any non-school-sponsored distributions contain the phrase: "The opinions expressed are not necessarily those of the School District or its personnel." This appears to be a direct regulation of the content of pure speech because it requires that every piece of non-school-sponsored material contain this disclaimer. *McIntyre*, 115 S. Ct. at 1518. In defense of the provision, defendants contend that "[t]his subsection is to address constitutional challenges to schools such as those involved in *Berger v. Rensselaer Central Sch. Corporation*, 982 F.2d 1160 (7th Cir. 1993). In the *Berger* case the school was held to have violated the establishment clause because it allowed the distribution of Gideon Bibles on the premises of the School." (Defendants' Brief at 21). The school district at issue in *Berger*, however, did far more than merely allow the Gideons to distribute their Bibles. That school district was found to have violated the Establishment Clause because the district "gave the Gideons preferential treatment, convened the student body to hear their presentation, and required each pupil to accept a Bible in a formal ceremony." *Hedges*, 9 F.3d at 1299. The school district policy at issue in the present case does nothing more than treat religious speech like any other protected speech. "Permitting individual students to pass out literature with religious themes, at times and places they could pass out literature with political or artistic themes, does not entail a similar preference [as that in *Berger*]. *Id.* This is all the Establishment Clause requires— neutrality toward religion. "The mere fact that student speech takes place on school property does not transform that speech into government speech." (Muller Reply Brief at 4)(citing *Board of Education of the Westside Community v. Mergens*, 495 U.S. 226, 250,

110 L.Ed. 2d 191, 110 S. Ct. 2356 (1990)). A school can stress its religious neutrality by reminding students and parents that it does not adopt the views of pupils who pass out literature at school. *Hedges*, 9 F.3d at 1299. The school district could, for example, post signs clarifying that it does not adopt the views of students or could include such a message in the Code itself" which is provided to each District pupil at the beginning of the school year." (Defendants' Brief at 3.) It is unnecessary and unreasonable, however, for the school district to prohibit the distribution of materials, simply because they do not contain the Code's disclaimer. "Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than squelch the speaker." *Hedges*, 9 F.3d at 1299.

Muller also challenges the § 6144.11 Code provision which requires a principal to inform the distributor(s) of non-school-sponsored materials that distribution may not be started, or must stop, if the principal concludes that the materials 1) contain libelous or obscene language, 2) may incite (lead) persons to illegal acts, or 3) are insulting to any group or individual, or if the principal can reasonably forecast that distribution of the materials to the students would greatly disrupt or materially interfere with school procedures and intrude into school affairs or the lives of others. Considering the age and emotional maturity level of fourth grade students and the educational mission of this elementary school, the Court finds these speech restrictions to be reasonable.[6]

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[6] The legitimacy of these restrictions is further aided by the policy's requirement that the principal state the reason for his decisions. This provision will help prevent speech from being impeded for arbitrary, capricious or discriminatory reasons.

Lastly, Muller takes issue with § 6144.12 of the Code. This section states, "The written permission of the school principal or Superintendent of Schools is required before the students may distribute or display on designated bulletin boards, materials from sources outside the school." Because the principal and superintendent are charged with the responsibility of maintaining order within the schools, this provision is certainly reasonable. Allowing elementary school students to distribute fliers anywhere they want, anytime they want, saying anything they want, is not something the Constitution requires. Further, the requirement of written permission will help hold the principal and superintendent more accountable.

II. AS APPLIED

Miller and Principal Miley provide different versions of the reasons Miley allegedly gave Muller for why Muller could not distribute his fliers. Muller contends Miley told him the fliers could not be distributed because they were religious. Miley maintains he told Muller that the fliers could not be distributed to the entire class because they were not school related. Regardless of which version is more accurate, Principal Miley did not prohibit the distribution of Muller's fliers for reasons outlined by the school district's own policy.

According to defendants, Miley told Muller he could not hand out the fliers to his class "<u>because they were not school supported or directly related to school programs.</u>" (Defendants' Brief at 4)(Emphasis in original.) The school district Code, however, expressly states, "Publications produced by school district students without school sponsorship, or handbills, may be distributed and/or sold within the school according to the following procedure." Thus, the Code clearly allows for the distribution of non-

school-sponsored publications within the school, so long as the publications meet the requirements of the Code and are distributed in accordance with the procedures provided by the Code.

Muller contends that Miley's sole reason for prohibiting distribution of the fliers was because of their religious nature. If this is an accurate representation of the reason Miley gave for prohibiting distribution, under the school district's own policies and the First Amendment, *see Hedges v. Wauconda Community Unit Sch. District No. 118*, 9 F.3d 1295 (7th Cir. 1993), this is an illegitimate reason for denying Muller the right to distribute his non-school-sponsored literature. According to the school district's own policies, Miley had several grounds upon which he could deny the distribution of non-school-sponsored literature. According to the Code as it existed at the time, Miley could have prohibited distribution on the grounds that: 1) the literature intended to be distributed did not include the name of the sponsoring organization and/or individual, 2) a time and place for the distribution of the material had not been set cooperative with the principal, 3) a copy of the material had not first been given to the principal at least 24 hours prior to its distribution, or 4) the publication did not contain the phrase: "The opinions expressed are not necessarily those of the school district or its personnel."[7] Miley also could have legitimately prohibited distribution of the fliers if he found that they: 1) contained libelous or obscene language, 2) might incite (lead) persons to illegal acts, or 3) were insulting to any group or individual. Miley further would have been permitted, indeed required, to prohibit distribution of Muller's materials if, at

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[7] As this opinion has previously made clear, a principal may no longer prohibit the distribution of non-school-sponsored materials solely on the grounds that the literature does not contain this phrase.

the time, Miley could have reasonably forecasted that the distribution of the fliers to the students would greatly disrupt or materially interfere with the school procedures or intrude into school affairs or the lives of others. To be in conformity with the school district's own policies, however, Miley could not, and may not, prohibit distribution of non-school-sponsored literature solely because the literature is religious in nature. Indeed, a policy or practice which automatically forbids the distribution of materials just because they are religious in nature would violate the First Amendment. *Hedges*, 9F.3d at 1297.

In accordance with the foregoing, the Court enjoins Principal Miley from prohibiting Andrew Muller from distributing non-school-sponsored materials solely on the grounds that the material is religious or is not a school-sponsored or related to school activities.

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Muller's request for preliminary and permanent injunctive relief is **GRANTED** in that the defendants are enjoined from preventing dissemination by Andrew Muller of the subject materials solely on the grounds that they are religious in nature, or that they are unrelated to school programs or not supported by the school; and

2. Muller's request for declaratory judgment is **GRANTED** in part in that the Court finds all the challenged provisions of the Code to be constitutional except the

provision requiring that non-school-sponsored publications contain the phrase: "The opinions expressed are not necessarily those of the school district or its personnel; " and

3. Having resolved all the pending issues in the present matter, Case No. 95-C-0422 is **CLOSED.**

Dated at Milwaukee, Wisconsin this 14th day of September, 1995.

SO ORDERED,

HON. RUDOLPH T. RANDA
U.S. District Judge

RACINE UNIFIED SCHOOL DISTRICT POLICY: CODE OF STUDENT RESPONSIBILITIES AND RIGHTS (1994-1995)

Section 6144.11 of Respondents' School Board Policy appears in Respondents' Racine Unified School District's Code of Student Responsibilities and Rights (1994-1995) ("Code") as Code Section IV(O). The School Board Policy Section 6144.11, provisions (1), (2), (3), (4) and (5) are identical to Code Section IV(O), provisions (a), (b), (c), (d) and (e). Section IV(O) of the Code states:

> Publications produced by School District students without school sponsorship, or handbills, may be distributed and/or sold within the school according to the following procedure:
>
> a. They must include the name of the sponsoring organization and/or individual.
>
> b. A time and place for distribution must be set cooperatively with the principal.
>
> c. A copy must be given to the principal at least 24 hours before its distribution.
>
> d. The publication shall contain this phrase: "The opinions expressed are not necessarily those of the School District or its personnel."
>
> e. If the principal finds the publication (1) contains libelous or obscene language, (2) may incite (lead) persons to illegal acts, (3) is insulting to any group or individual, or (4) he/she can reasonably forecast that its distribution to the

> students will greatly disrupt or materially interfere with school procedures and intrude into school affairs or the lives of others, the principal shall notify the sponsors of the publication that its distribution may not be started, or must stop. The principal shall state the reason for his/her decisions.

Section 6144.12 of Respondents' School Board Policy appears in Respondents' Racine Unified School District's Code of Student Responsibilities and Rights (1994-1995) ("Code") as Section IV(P). Section 6144.12 mirrors Code Section IV(P), which states:

> The written permission of the school principal or the Superintendent of Schools is required before students may distribute or display on designated bulletin boards. materials from sources outside the school.